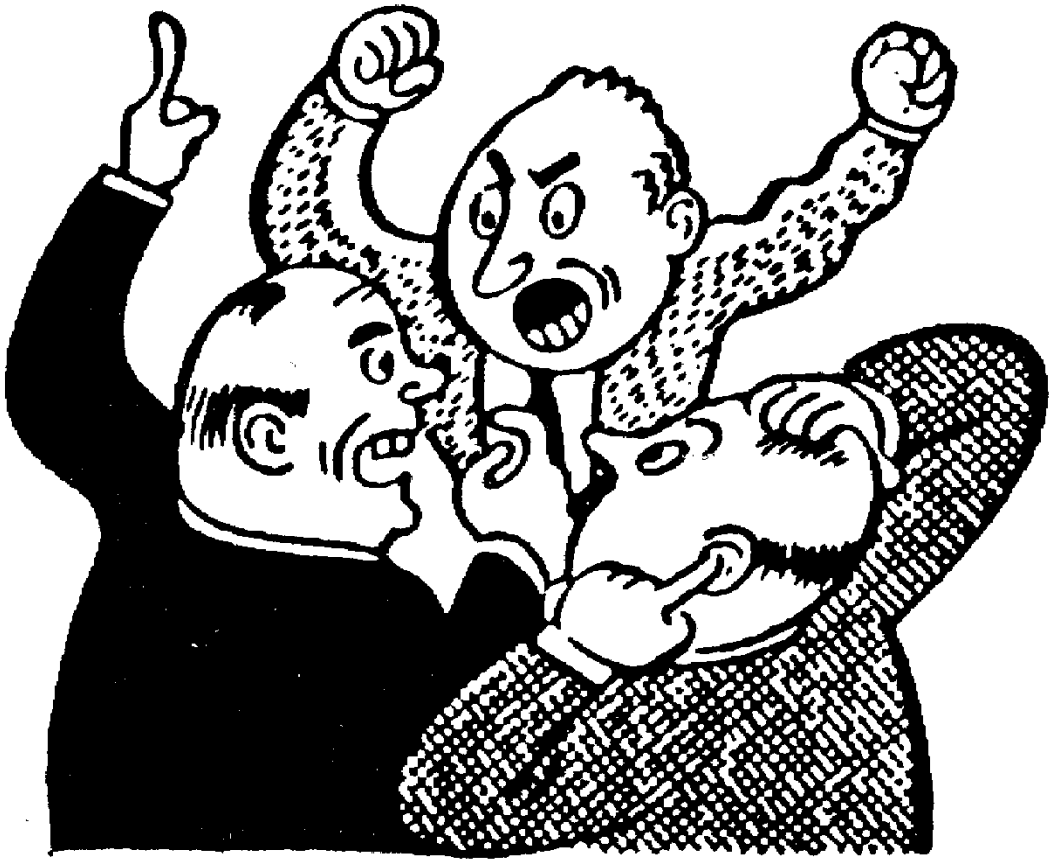
Chapter 8
Negotiated Procurements



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CHAPTER 8

NEGOTIATED PROCUREMENTS AND SOURCE SELECTION

I. INTRODUCTION

A. Assisting at all stages of the procurement process is critical for the contract attorney.

1. Helping prepare acquisition documents is one of the paramount roles for the contract attorney.

2. It is important for the contract attorney to help avoid problems by becoming involved early on during the extensive planning process required when agencies conduct a competitively negotiated procurement.

3. The contract attorney must understand the procedures used to conduct a competitively negotiated source selection.

4. Contract attorneys should look for ways to simplify the process whenever possible.

5. Contract attorneys should help their agency's avoid some of the common problem areas in awarding competitively negotiated procurements.

6. Contract attorneys should help their agencies assert maximum flexibility and not fear subjectivity (a/k/a business judgment); contract attorneys should help their agencies adequately explain and document such judgments.

B. Background.

1. In the past, negotiated procurements were known as "open market purchases." These procurements were authorized only in emergencies.

2. The Army Air Corps began using negotiated procurements in the 1930s to develop and acquire aircraft.

3. Negotiated procurements became universal during World War II. The Armed Services Procurement Act of 1947 authorized negotiated procurements for peacetime use if one of seventeen exceptions to formal advertising (now sealed bidding) applied.

4. In 1962, Congress codified agency regulations that required contractors to submit cost/pricing data for certain procurements to aid in the negotiation process.

5. The Competition in Contracting Act (CICA) of 1984 expanded the use of negotiated procurements by eliminating the traditional preference for formal advertising (now sealed bidding).

6. In the early 1990s, Congress: (a) modified the procedures for awarding contracts on initial proposals; (b) expanded debriefings; and (c) made other minor procedural changes in the negotiated procurement process.

7. In 1997, the Federal Acquisition Regulation (FAR) Part 15 rewrite effort resulted in significant changes to the rules regarding: (a) exchanges with industry; (b) the permissible scope of discussions; and (c) the competitive range determination.

II. CHOOSING NEGOTIATIONS.

A. Sealed Bidding or Competitive Negotiations. The CICA eliminated the historical preference for formal advertising (now sealed bidding). Statutory criteria now determine which procedures to use.

B. Criteria for Selecting Competitive Negotiations. 10 U.S.C. § 2304(a)(2) and 41 U.S.C. § 253(a)(2). The CICA provides that, in determining the appropriate competitive procedure, agencies:

1. Shall solicit sealed bids if:

a. Time permits the solicitation, submission, and evaluation of sealed bids;

b. The award will be made solely on the basis of price and other price-related factors;

c. It is unnecessary to conduct discussions with responding sources about their bids; and

d. There is a reasonable expectation of receiving more than one sealed bid.

2. Shall request competitive proposals if sealed bids are not appropriate under B.1, above. See also FAR 6.401 (listing these same criteria).

3. Competitive proposals are the default for contracts awarded and performed outside the United States. See FAR 6.401(b)(2) (directing the use of

competitive proposals for contracts to be made and performed outside the United States and its outlying areas unless discussions are not required and the use of sealed bids are otherwise appropriate).

4. Contracting Officer's Discretion.

   a. The decision to use competitive negotiations under FAR Part 15 is largely a discretionary matter within the purview of the contracting officer's business judgment, which will not be upset unless it is unreasonable.

   b. For the decision to be considered reasonable, the contracting officer must demonstrate that one or more of the sealed bidding criteria is not present. See Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1364 (Fed. Cir. 2009) (reversing the trial court and holding that the contracting officer reasonably included non-price evaluation factors in the RFP and concluded that sealed bidding was not required); see also Ceres Envtl. Serv., Inc., B-310902, Mar. 3, 2008, 2008 CPD ¶ 148 (finding that the Corps of Engineers reasonably concluded it needed to evaluate non-price factors, to include a possible price/technical tradeoff, in a canal construction project despite previous canal construction projects having been awarded under sealed bidding); Specialized Contract Serv., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 (finding that the Army reasonably concluded it needed to evaluate more than price in procuring meal and lodging services). Compare Racal Corp., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (finding that the possible need to hold discussions to assess offerors' understanding did not justify the use of negotiated procedures where the Army did not require offerors to submit technical proposal), with Enviroclean Sys., B-278261, Dec. 24, 1997, 97-2 CPD ¶ 172 (finding that the Army reasonably concluded that discussions might be required before award).

5. A Request for Proposals (RFP) by any other name is still a RFP. Balimoy Mfg. Co. of Venice, Inc., B-253287.2, Oct. 5, 1993, 93-2 CPD ¶ 207 (finding that a purported IFB that calls for the evaluation of factors other than price is not an IFB and is not a proper matter for protest post-award). Any inconsistency between labeling a solicitation an IFB and providing for consideration of non-price factors may only be protested prior to bid opening when the inconsistencies are apparent on the face of the solicitation. *Id*.

C. Comparing the Two Methods.

	Sealed Bidding	Negotiations
Evaluation Criteria	Price and Price-Related Factors	Price and Non-Price Factors
Responsiveness	Determined at Bid Opening	N/A
Responsibility	Based on Pre-Award Survey; SBA May Issue COC	May be Evaluated Comparatively Based on Disclosed Factors
Contract Type	FFP or FP w/EPA	Any Type
Discussions	Prohibited	Required (Unless Properly Awarding w/o Discussions)
Right to Withdraw	Firm Bid Rule	No Firm Bid Rule
Public Bid Opening	Yes	No
Flexibility to Use Judgment	None	Much
Late Offer/Modifications	Narrow Exceptions	Narrow Exceptions
Past Performance	Evaluated on a Pass/Fail Basis as Part of the Responsibility Determination	Included as an Evaluation Factor; Comparatively Assessed; Separate from the Responsibility Determination

III. ACQUISITION PLANNING.

A. Key Definitions.

1. Acquisition Planning. The process through which efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency's need, including developing a strategy for managing the acquisition. FAR § 2.101.

2. Market Research. The attempts of an agency to ascertain whether other qualified sources and commercial or non-developmental items exist that are capable of meeting the government's requirement. FAR § 2.101; FAR 10.001; DFARS 201.001.

3. Source Selection Process. The process of soliciting and evaluating proposals for award in a competitively negotiated environment. Army Materiel Command (AMC) Pamphlet 715-3.

B. Policy. Agencies shall perform acquisition planning and conduct market research to promote full and open competition, or if full and open competition is not required, to promote competition to the maximum extent practicable. FAR § 7.102; see 10 U.S.C. § 2305(a)(1)(A)(ii).

C. General Principles.

1. Begin Planning Early.

a. Planning should start before the fiscal year in which the contract will be awarded. Begin planning when the need is identified. FAR § 7.104(a).

b. A lack of advance planning does not justify using other than competitive acquisition procedures. 10 U.S.C. § 2304(f)(5); see, e.g., Major Contracting Svcs., Inc., B-401472, Sep. 14, 2009, 2009 CPD ¶ 170 (sustaining a protest that the Army improperly extended a contract on a sole source basis due to inadequate advance planning).

D. Responsibilities.

1. The program manager or other official responsible for the program has overall responsibility for acquisition planning. Defense Federal Acquisition Regulation Supplement (DFARS) § 207.103(g).

2. Agency heads must ensure that an increasing level of formality in the planning process is used as acquisitions become more costly and complex. FAR § 7.103(d).

E. Written Acquisition Plans.

1. Written acquisition plans are required for:

a. Development acquisitions exceeding $10 million total cost for the acquisition program.

b. Production or service acquisitions when the total cost of all program contracts will exceed $50 million for all years, or $25 million in a single year. DFARS § 207.103(d)(i)(B).

c. Acquisition Planning Resources

(1) FAR subpart 7.1 and DFARS subpart 207.1.

(2) Department of Defense Source Selection Procedures, March 4, 2011: www.acq.osd.mil/dpap/policy/policyvault/USA007183-10-DPAP.pdf.

(3) Army Source Selection Supplement (AS3) to the Department of Defense Source Selection Procedures, December 21, 2012: http://www.spd.usace.army.mil/Portals/13/docs/Small_Business/Army%20Source%20Selection%20Supplement%20(Dec%202012).pdf

(4) Defense Acquisition University Sample Format: http://webcache.googleusercontent.com/search?q=cache:sQ7mgTJiZrwJ:https://acc.dau.mil/GetAttachment.aspx%3Fid%3D31482%26pname%3Dfile%26aid%3D5708+dau+%22acquisition+plan%22&cd=2&hl=en&ct=clnk&gl=us.

(5) Navy Acquisition Planning Guide: https://acquisition.navy.mil/content/view/full/5004.

(6) Department of Homeland Security: http://www.dhs.gov/xlibrary/assets/DHS_ACQ_Planning_Guide_Notice_05-02.pdf.

F. Source Selection Plan. Source selection plans are internal agency working documents. An agency's evaluation of proposals must be reasonable and consistent with the solicitation's stated evaluation criteria. An agency's failure to adhere to its source selection plan does not provide a viable basis of protest because offerors have no rights in an agency's source selection plan. Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9; All Star-Cabaco Enter., Joint Venture, B-290133, B-290133.2, June 25, 2002, 2002 CPD ¶127. For a discussion on source selection plans, see AFARS, Appendix AA, Army Source Selection Manual, Chapter 3, Source Selection Plan.

IV. PLANNING CONSIDERATIONS.

A. Acquisition Background and Objectives. FAR § 7.105.

1. Statement of Need.

2. Cost.

3. Capability or performance.

4. Delivery or performance-period times.

5. Trade-offs.

6. Risks.

7. Acquisition Streamlining.

B. Plan of Action. FAR § 7.105(b).

1. Identification of potential sources.

2. Competition – How will full and open competition be obtained? If it will not be obtained, what justifies other than full and open competition?

3. Source-selection procedures – the timing for submission and evaluation of proposals and the relationship of evaluation factors to the attainment of the acquisition objectives. See FAR Subpart 15.3.

4. Contracting considerations:

a. Contract Types.

b. Multiyear contracting, options, special contracting methods.

c. Special contract clauses, solicitation provisions, or FAR deviations.

d. Consolidation. DFARS § 207.170 and 15 USC 657q.

(1) The 2013 NDAA, Pub. L. 103-355, repealed the former consolidation statute, 10 U.S.C. 2382, which is implemented by DFARS 207.170.

(2) The relevant portion of the 2013 NDAA amended the Small Business Act, and is codified at 15 U.S.C. 657q. Under the statute, the term "consolidation of contract requirements," with respect to contract requirements of a Federal agency, means a use of a solicitation to obtain offers for a single contract or a multiple award contract (A) to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited; or (B) to satisfy requirements of the Federal

agency for construction projects to be performed at 2 or more discrete sites.

(a) **Note the focus on construction projects in (B), which is different than the previous definition at 10 U.S.C. 2382 and DFARS 207.170.

(b) Under the statute, the head of a Federal agency may not carry out an acquisition strategy that includes a consolidation of contract requirements of the Federal agency with a total value of more than $2,000,000, unless the senior procurement executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy has conducted market research, identified alternative approaches, made a written determination that consolidation is necessary and justified, identified any negative impact on small business concerns, and ensure that steps will be taken to include small business concerns in the acquisition strategy.

(3) Under the DFARS, "consolidation" means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency or activity for supplies or services that previously have been provided to, or performed for, that department, agency or activity under two or more separate contracts. DFARS § 207.170-2.

(a) Per the DFARS, agencies shall not consolidate contract requirements with an estimated total value exceeding $6 million unless the acquisition strategy includes (1) the results of the market research; (2) an identification of any alternative contracting approaches that would involve a lesser degree of consolidation; and (3) a determination by the senior procurement executive that the consolidation is necessary and justified. DFARS § 207.170-3(a).

(b) DFARS § 207.170-3(a) articulates the categories of benefits that may justify consolidation of contract requirements, but cautions that savings in administrative or personnel costs alone do not constitute a sufficient justification for a

consolidation of contract requirements unless such savings would be considered "substantial."

(c) DoD has issued a Class Deviation 2013-O0021, regarding Contract Consolidation. This class deviation lowers the dollar threshold as set forth at DFARS 207.170-3(a) from $6 million to $2 million. This class deviation is effective until incorporated into the FAR and/or DFARS, or rescinded.

e. Performance-based service contracts. Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis. See FAR §§ 37.102(a), 16.505(a)(3).

(1) In general, agencies must use performance based acquisition methods to the maximum extent practicable. FAR § 37.102(a).

(2) Section 821 of the FY 2001 National Defense Authorization Act established a preference for performance-based service contracts (PBSC). Pub. L. No. 106-398, §821, 114 Stat. 1654 (2000).

(3) The Government Accountability Office concluded that while agencies are utilizing performance-based contracting, more guidance was needed to increase agency understanding of PBSCs and how to best take advantage of the methodology. GEN. ACCT. OFF., REP. NO. GAO-02-1049, *Contract Management: Guidance Needed for Performance-Based Service Contracting* (Sept. 2002).

5. Funding.

6. Inherently Governmental functions. (FAR § 7.5)

7. Government-furnished property and information. (FAR § 45.102)

8. Environmental Considerations.

9. Prohibition on personal service contracts (FAR § 37.104).

C. Peer Reviews

1. DoD acquisitions valued at $1 billion or more – The Office of the Director, Defense and Acquisition Policy (DPAP), will organize teams of reviewers

and facilitate Peer Reviews for solicitations and contracts valued at $1 billion or more. DFARS § 201.170(a).

a. Pre-award Peer Review of solicitations valued at $1 billion or more (including options) are required for all acquisitions. DFARS § 201.170(a)(1)(i).

b. Post-award Peer Reviews will be conducted for all contracts for services valued at $1 billion or more (including options). DFARS § 201.170(a)(1)(ii).

c. Peer Reviews will be conducted using the procedures at PGI 201.170.

2. DoD acquisitions valued at less than $1 billion – The military departments, defense agencies and DoD field activities shall establish procedures for Pre-Award and Post-Award Peer Reviews of solicitations and contracts valued at less than $1 billion. DFARS § 201.170(b).

a. For the Army, all solicitations and contracts with an estimated value greater than $50 million will be approved through a Solicitation Review Board (SRB) and Contract Review Board (CRB). The contracting activity's Principal Assistant Responsible for Contracting (PARC) will establish procedures for contract actions with an estimated value of $50 million or less. AFARS § 5101.170(b).

b. Post-Award Peer Reviews for services contracts shall occur when the contract value is $500 million or more. AFARS § 5101.170(b)(2).

V. PREPARING SOLICITATIONS AND RECEIVING INITIAL PROPOSALS.

A. Developing a Request for Proposals (RFP). The three major sections of an RFP are: Specifications (Section C), Instructions to Offerors (Section L), and Evaluation Criteria (Section M). See FAR 15.204-2 to 15.204-5 (briefly describing Sections A thru M of an RFP). Contracting activities should develop these three sections simultaneously so that they are tightly integrated.

1. Section B lays out the pricing and contract line item structure of the procurement including quantities.

2. Section C describes the required work and is referred to as a statement of work or performance work statement.

3. Section H contains special contract clauses applicable to the current acquisition (e.g., special warranty requirements, key personnel).

4. Section L describes what information offerors should provide in their proposals and prescribes the format.

   a. Well written Instructions may reduce the need for discussions merely to understand the offerors' proposals.

   b. Instructions also make the evaluation process more efficient by dictating page limits, paper size, organization, and content. [NOTE: An offeror ignores these instructions and limitations at its peril. See Mathews Assocs., Inc., B-299205, Mar. 5, 2007, 2007 CPD ¶ 47 (upholding Army's rejection of an electronically submitted proposal where the proposal exceeded the margin limit set forth in the solicitation and concluding there is nothing unfair, or unduly burdensome, about requiring offerors to assume the risks associated with submitting proposals that do not comply with clearly stated solicitation formatting requirements); Coffman Specialists, Inc., B-284546, B-284546.2, May 10, 2000, 2000 CPD ¶ 77 (finding that the agency reasonably downgraded a proposal that failed to comply with solicitation's formatting requirement); see also U.S. Envtl. & Indus., Inc., B-257349, July 28, 1994, 94-2 CPD ¶ 51 (concluding that the agency properly excluded the protester from the competitive range after adjusting its proposal length for type size smaller than the minimum allowed and refusing to consider the "excess" pages)].

   c. Instructions should avoid requesting surplus information and simply request information that will be evaluated in Section M. Well written proposal instructions and Section M evaluation criteria should be consistent and read well together.

5. Section M describes how the government will evaluate proposals.

   a. The criteria must be detailed enough to address all aspects of the required work, yet not so detailed as to mask differences in proposals. FAR 15.304 discusses evaluation factors and significant subfactors, to include factors that must be considered by the agency and therefore referenced in Section M.

   b. Solicitations must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the government's evaluation plan. See QualMed, Inc., B-254397.13, July 20, 1994, 94-2 CPD ¶ 33.

c. Evaluation scheme must include an adequate basis to determine cost to the government of competing proposals. S.J. Thomas Co, Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

B. Drafting Evaluation Criteria.

1. Statutory Requirements.

a. 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a(b) require each solicitation to include a statement regarding:

(1) All the significant factors and subfactors the agency reasonably expects to consider in evaluating the proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors), and

(2) The relative importance of each factor and subfactor.

See FAR 15.304(d).

b. 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) further require agency heads to:

(1) Clearly establish the relative importance of the evaluation factors and subfactors, including the quality factors and subfactors (e.g., technical capability, management capacity, prior experience, and past performance);

(2) Include cost/price as an evaluation factor; and

(3) Disclose whether all of the non-cost and non-price factors, when combined, are:

(a) Significantly more important than cost/price;

(b) Approximately equal in importance to cost/price; or

(c) Significantly less important than cost/price.

See FAR 15.304(d), (e).

2. Mandatory Requirements for Evaluation Factors.

a. Cost or Price. 10 U.S.C. § 2305(a)(3)(A)(ii); 41 U.S.C. § 253a(c)(1)(B); FAR 15.304(c)(1). Agencies must evaluate cost/price in every source selection.

(1) While cost/price need not be the most important evaluation factor, cost or price must always be a factor. See Medical Staffing Joint Venture, B-400705.2, B-400705.3, Mar. 13, 2009, 2009 CPD ¶ 71 (stating that the evaluation criteria must provide for a reasonable assessment of the cost of performance of competing proposals);

(2) But see RTF/TCI/EAI Joint Venture, B-280422.3, Dec. 29, 1998, 98-2 CPD ¶ 162 (denying a protest alleging failure to consider price because the protestor was unable to show prejudice from Army's error).

(3) This requirement extends to the evaluation of Indefinite Delivery / Indefinite Quantity ("ID/IQ") Contracts. CW Govt. Travel, Inc. – Reconsideration, B-295530, July 25, 2005, 2005 CPD ¶ 139 (sustaining a protest where the agency's use of a sample task order for evaluation purposes for an ID/IQ did not bind the offers to the prices used in the sample task and therefore did not consider price); accord S.J. Thomas Co, Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73.

b. Technical and Management (i.e., Quality) Factors. The government must also consider quality in every source selection. See FAR 15.304(c)(2).

(1) The term "quality" refers to evaluation factors other than cost/price (e.g., technical capability, management capability, prior experience, and past performance). See 10 U.S.C. § 2305(a)(3)(A)(i); 41 U.S.C. § 253a(c)(1)(A); see also FAR 15.304(c)(2) (adding personnel qualifications and compliance with solicitation requirements as "quality" evaluation factors).

(2) FAR 15.304(a) recommends tailoring the evaluation factors and subfactors to the acquisition, and FAR 15.304(b) recommends including only evaluation factors and significant subfactors that:

(a) Represent key areas that the agency plans to consider in making the award decision;[1] and

(b) Permit the agency to compare competing proposals meaningfully.

c. Past Performance.

(1) Statutory Requirements.

(a) The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1091, 108 Stat. 3243, 3272 [hereinafter FASA], added a note to 41 U.S.C. § 405 expressing Congress' belief that agencies should use past performance as an evaluation factor because it is an indicator of an offeror's ability to perform successfully on future contracts.

(b) The FASA also directed the Administrator OFPP to provide guidance to executive agencies regarding the use of past performance 41 U.S.C. § 405(j).

(c) The Office of Federal Procurement Policy (OFPP) in May 2000 published a guide titled Best Practices for Collecting and Using Current and Past Performance Information, available at: http://www.whitehouse.gov/omb/best_practice_re_past_perf/.

(2) FAR Requirement. FAR 15.304(c)(3); FAR 15.305(a)(2).

(a) Agencies must include past performance as an evaluation factor in all RFPs expected to exceed the simplified acquisition threshold.

(b) On September 24, 2013, the Director of Defense Procurement and Acquisition Policy (DPAP) issued a class deviation. See DFARS 215.304. DARS Tracking Number 2013-O00184, available at: http://www.acq.osd.mil/dpap/dars/class_deviations.html. For the Department of Defense, past

[1] It is Army policy to establish the absolute minimum number of factors necessary for evaluation of proposals. Factors and subfactors must be limited to those which (a) are expected to surface real and measurable discriminators between offerors, and (b) have enough value to warrant the payment of a meaningful cost/price premium to obtain the measured discrimination. AFARS 5115.304(b)(2).

performance is mandatory only for the following contracts:

(i) Systems & operation support > $5 million.

(ii) Services, information technology, or science & technology > $1 million.

(iii) For all other acquisitions expected to exceed the simplified acquisition threshold.

(c) The contracting officer may make a determination that past performance is not an appropriate evaluation factor even if the contract falls in either category *(a) or (b) above.* The contracting officer must document why past performance is not an appropriate evaluation factor. FAR § 15.304(c)(3).

(d) The RFP must:

(i) Describe how the agency plans to evaluate past performance, including how it will evaluate offerors with no relevant performance history;

(ii) Provide offerors with an opportunity to identify past or current contracts for similar work; and

(iii) Provide offerors an opportunity to provide information regarding any problems they encountered on the identified contracts and their corrective actions.

(e) Contrasted with Past Experience.

(i) Past Performance is **HOW** well the offeror performed on previous efforts.

(ii) Experience evaluation is **WHAT** past experience the offeror possesses and brings to the current procurement.

(iii) Example. GAO denied a protest claiming that an agency failed to consider negative information regarding the awardee's past

performance where the solicitation specifically provided for evaluation of past experience, *but not* past performance. Highland Engineering, Inc., B-402634, June 8, 2010, 2010 CPD ¶ 137.

(iv) A cautionary note is warranted to avoid double counting/penalizing an offeror if evaluating both past performance and experience. See GlassLock, Inc., B-299931, Oct. 10, 2007, 2007 CPD ¶ P 216.

(v) Small Business Participation.

(3) FAR Requirements. FAR 15.304(c)(4). Agencies must evaluate the extent to which small disadvantaged business concerns will participate in the performance of:

(a) Unrestricted acquisitions expected to exceed $650,000; and

(b) Construction contracts expected to exceed $1.5 million.

But see FAR 19.201 and FAR 19.1202 (imposing additional limitations).

(4) DOD Requirements. DFARS 215.304. Agencies must evaluate the extent to which small businesses, historically black colleges, and minority institutions will participate in the performance of the contract if:

(a) The FAR requires the use of FAR 52.219-9, Small Business Subcontracting Plan (see FAR 19.708; see also FAR 15.304(c)(4)), and

(b) The agency plans to award the contract on a tradeoff as opposed to lowest price technically acceptable basis.

3. Requirement to Disclose Relative Importance. FAR 15.304(d).

a. Agencies must disclose the relative importance of all significant evaluation factors and subfactors and describe at a minimum whether the non-price factors when combined are:

(1) Significantly more important than cost/price, OR

(2) Significantly less important than cost/price, OR

(3) Approximately equal to cost/price. FAR § 15.304(e).

b. Agencies should disclose the relative order of importance either by:

(1) Providing percentages or numerical weights[2] in the RFP;

(2) Providing an algebraic paragraph;

(3) Listing the factors or subfactors in descending order of importance; or

(4) Using a narrative statement.

c. The GAO presumes the listed factors are equal if the RFP does not state their relative order of importance.

(1) For example, in Fintrac, Inc., B-311462.3, Oct. 14, 2008, 2008 CPD ¶ 191, the RFP listed the major evaluation factors in "descending order of importance" but was silent as to the weight of the subfactors. GAO stated that where a solicitation does not disclose the relative weight of evaluation factors or subfactors in the solicitation, they are presumed approximately equal in importance or weight. See also Bio-Rad Labs., Inc., B-297553, Feb. 15, 2006, 2007 CPD ¶ 58 (finding that where an agency failed to inform offerors it was conducting the procurement as a simplified acquisition and conducted the acquisition in a manner indistinguishable from a negotiated procurement, offerors could reasonably presume listed subfactors were approximately equal in importance).

(2) The better practice is to state the relative order of importance expressly.

(3) Agencies should rely on the "presumed equal" line of cases only when a RFP inadvertently fails to state the factors' relative order of importance. See LLH & Assoc., LLC, B-297804, Mar. 6, 2006, 2006 CPD ¶ 52; Meridian

[2] Numerical weighting is no longer an authorized method of expressing the relative importance of factors and subfactors in the Army. Evaluation factors and subfactors must be definable in readily understood qualitative terms (i.e., adjectival, colors, or other indicators, but not numbers) and represent key areas of importance to be considered in the source selection process. See AFARS 5115.304(b)(2)(D).

Corporation, B-246330, B-246330.3, July 19, 1993, 93-2 CPD ¶ 29 (applying the "equal" presumption).

d. Agencies need not disclose their specific rating methodology in the RFP. FAR 15.304(d); see D.N. American, Inc., B-292557, Sept. 25, 2003, 2003 CPD ¶ 188 (noting that unlike evaluation factors for award, an agency is not required to disclose its specific rating methodology such as the color-coded scheme used to rate offerors' proposals in the case); ABB Power Generation, Inc., B-272681, Oct. 25, 1996, 96-2 CPD ¶ 183.

e. GO/NO GO. The FAR does not prohibit a pure pass/fail method. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131. Because pass/fail criteria imply a minimum acceptable level, these levels should appear in the RFP. See Nat'l Test Pilot Sch., B-237503, Feb. 27, 1990, 90-1 CPD ¶ 238 (holding that award to the low-cost, technically acceptable proposal was inconsistent with the statement that the technical factors were more important than cost); see also CXR Telecom, B-249610.5, Apr. 9, 1993, 93-1 CPD ¶ 308 (discouraging benchmarks that lead to the automatic exclusion of otherwise potentially acceptable offerors but noting that benchmarks within the discussion process provide an opportunity to highlight and correct deficiencies).

4. Requirement to Disclose Basis of Award. FAR 15.101-1; FAR 15.101-2.

a. Agencies must disclose how they intend to make the award decision.

b. Best Value Continuum. An agency may obtain the best value by using any one or a combination of source selection approaches as the relative importance of cost or price may vary in different types of acquisitions. FAR 15.101.

c. Agencies generally choose the Tradeoff process or the lowest price technically acceptable to achieve best value.

(1) The Tradeoff process. FAR 15.101-1.

(a) Appropriate where it may be in the best interests of the government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) Permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal.

(c) The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file.

(2) Lowest Price Technically Acceptable (LPTA). FAR 15.101-2. The LPTA process is similar to sealed bidding with award going to the lowest priced technically acceptable offer. The big difference, however, between sealed bidding and LPTA is that discussions can be held to ensure offerors understand the requirements and to help determine acceptability.

(a) Used only when requirements are clearly defined and risk of unsuccessful performance is minimal.

(b) Technical factors are "Go"/"No Go." Proposals are rated only for acceptability and are not ranked using the non-cost/price factors.

(c) A cost technical tradeoff is not permitted; award will go to the lowest price offer which meets the minimum technical standards. FAR 15.101-2. No additional credit will be awarded.

(d) Past performance must be considered as pass/fail (or neutral if no past performance) unless waived IAW FAR 15.304(c)(3)(iv).

5. Problem Issues When Drafting Evaluation Factors.

a. Options.

(1) The evaluation factors should address all evaluated options clearly. FAR 17.203. A solicitation that fails to state whether the agency will evaluate options is defective. See generally FAR Subpart 17.2. See also Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 (sustaining a protest where the agency failed to inform offerors that it would not evaluate options due to a change in its requirements).

(2) Agencies must evaluate options at the time of award; otherwise, they cannot exercise options unless the agency prepares a Justification and Approval (J&A) for the use of other than full and open competition under FAR Part 6. FAR 17.207(f); see Major Contracting Serv., Inc., B-401472, Sept. 14, 2009, 2009 CPD ¶ 170, aff'd upon reconsideration Dep't of Army—Reconsideration, B-401472.2, Dec. 7, 2009, 2009 CPD ¶ 250 (determining that an unpriced option to extend services under FAR Clause 52.217-8 was not evaluated as part of the initial competition and therefore was subject to the competition requirements of FAR Part 6).

(3) If the option quantities/periods change during solicitation, the agency may cancel or amend the solicitation. Saturn Landscape Plus, Inc., B-297450.3, Apr. 18, 2006, 2006 CPD ¶ 70 (finding no basis to question the agency's reasonable decision to cancel the solicitation and issue a revised solicitation to reflect reduced option periods).

(4) Variable Option Quantities are problematic because agencies must evaluate option prices at the time of award. Agencies use variable option quantities due to funding uncertainty. Consider averaging all option prices to determine evaluated price.

b. Key Personnel.

(1) A contractor's personnel are very important in a service contract.

(2) Evaluation criteria should address:

(a) The education, training, and experience of the proposed employee(s);

(b) The amount of time the proposed employee(s) will actually perform under the contract;

(c) The likelihood that the proposed employee(s) will agree to work for the contractor; and

(d) The impact of utilizing the proposed employee(s) on the contractor's other contracts.

See Biospherics, Inc., B-253891.2, Nov. 24, 1993, 93-2 CPD ¶ 333; cf. ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 (finding that the awardee's misrepresentation of the availability of key personnel justified overturning the award). But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 (concluding that it was not improper for an offeror to provide a substitute where it did not propose the key employee knowing that he would be unavailable).

(3) Agencies should request resumes, hiring or employment agreements, and proposed responsibilities in the RFP.

(4) To avoid problems during performance, the solicitation should contain a contract clause in Section H providing that key personnel can only be replaced with personnel of equal qualifications after contracting officer approval.

C. Notice of Intent to Hold Discussions.

1. 10 U.S.C. § 2305(a)(2)(B)(ii)(I) and 41 U.S.C. § 253a(b)(2)(B) require RFPs to contain either:

a. "[A] statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors," (The clause at FAR 52.215-1 (f)(4) satisfies this requirement) ***or***

b. "[A] statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussion conducted for the purpose of minor clarification[s]), unless discussions are determined to be necessary." (The clause at FAR 52.215-1 Alternate I (f)(4) satisfies this requirement)

2. Statutes and regulations provide no guidance on whether an agency should award with or without discussions. Contracting officers should consider factors indicating that discussions may be necessary (e.g., procurement history, competition, contract type, specification clarity, etc.). Discussions may be as short or as long as required, but offerors must be given an opportunity to revise proposals after discussions end.

3. The primary objective of discussions is to maximize the government's ability to obtain best value, based on the requirement and evaluation factors set forth in the solicitation. FAR 15.306(d)(2).

4. For the Department of Defense, the Director, Defense Procurement and Acquisition Policy, issued a memorandum on 8 January 2008 directing that awards should be made without discussions only in limited circumstances, generally routine, simple procurements. The memorandum is available at http://www.acq.osd.mil/dpap/policy/policyvault/2007-1480-DPAP.pdf.

5. A protest challenging the failure to include the correct notice in the solicitation is untimely if filed after the date for receipt of initial proposals. See Warren Pumps, Inc., B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187.

D. Exchanges with Industry Before Receipt of Proposals. The FAR encourages the early exchange of information among all interested parties to improve the understanding of the government's requirements and industry capabilities, provided the exchanges are consistent with procurement integrity requirements. See FAR 15.201. There are many ways an agency may promote the early exchange of information, including:

1. Industry day or industry/small business conferences;

2. Draft RFPs with invitation to provide comments to the contracting officer;

3. Requests for information (RFIs); and

4. Site visits.

E. Submission of Initial Proposals.

1. Proposal Preparation Time.

a. Agencies must give potential offerors at least 30 days after they issue the solicitation to submit initial proposals for contracts over the simplified acquisition threshold. 41 U.S.C. § 416; 15 U.S.C. § 637(e)(3); FAR 5.203(c). But see FAR 12.603 and FAR 5.203 for streamlined requirements for commercial items. For research and development contracts, agencies must give potential offerors at least 45 days after the solicitation is issued to submit initial proposals. FAR 5.203(e).

b. Amendments.

(1) An agency must amend the RFP if it changes its requirements (or terms and conditions) significantly. FAR 15.206; see Digital Techs., Inc., B-291657.3, Nov. 18, 2004, 2004 CPD ¶ 235 (upholding agency's decision to amend solicitation to account for a 40 percent increase in the amount of equipment to be maintained); Northrop Grumman Info. Tech., Inc.,. B-295526, et al., Mar. 16, 2005, 2005 CPD ¶ 45 (sustaining a protest when the Government should have amended the solicitation (but did not) to reflect that the agency was unlikely to exercise options).

(2) After amending the RFP, the agency must give prospective offerors a reasonable time to modify their proposals, considering the complexity of the acquisition, the agency's needs, etc. See FAR 15.206(g).

(3) Timing:

(a) ***Before*** established time and date for receipt of proposals, amendment goes to all parties receiving the solicitation. FAR 15.206(b).

(b) ***After*** established time and date for receipt of proposals, amendment goes to all offerors that have not been eliminated from the competition. FAR 15.206(c).

(4) If the change is so substantial that it exceeds what prospective offerors reasonably could have anticipated, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. FAR 15.206(e). An agency has broad authority to cancel a solicitation and need only establish a reasonable basis for cancellation. See Trade Links General Trading & Contracting, B-405182, Sept. 1, 2011, 2011 CPD ¶ 165.

2. Early "Proposals."

a. FAR 2.101 defines "offer" as a "response to a solicitation,that, if accepted, would bind the offeror to perform the resultant contract."

b. Agencies must evaluate offers that respond to the solicitation, even if the offer pre-dates the solicitation. STG Inc., B-285910, Sept. 20, 2000, 2000 CPD ¶ 155.

c. If an agency wants to preclude evaluation of proposals received prior to the RFP issue date, it must notify offerors and allow sufficient time to submit new proposals by the closing date. Id.

3. Late Proposals. FAR 15.208; FAR 52.215-1.

a. A proposal is late if the agency does not receive it by the time and date specified in the RFP. FAR 15.208; Haskell Company, B-292756, Nov. 19, 2003, 2003 CPD ¶ 202 (key is whether the government could verify that a timely proposal was submitted).

(1) If no time is stated, 4:30 p.m. local time is presumed. FAR 15.208(a).

(2) FAR 15.208 and FAR 52.215-1 set forth the circumstances under which an agency may consider a late proposal.

(3) The late proposal rules mirror the late bid rules. See FAR 14.304.

(4) Example. Proposal properly rejected as late where the proposal was received by email after the closing time for proposals and no exception permitted evaluation of the late proposal. Alalamiah Technology Group, B-402707.2, June 29, 2010, 2010 CPD 148.

b. Both technical and price proposals are due before the closing time. See Inland Serv. Corp., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266.

c. The underlying policy of the late proposal rule is to avoid confusion and ensure fair and equal competition. Therefore, a proposal is not late when an agency timely receives at least one complete copy of the proposal prior to closing time. See Tishman Constr. Corp., B-292097, May 29, 2003, 2003 CPD ¶ 94 (finding proposal timely submitted where contractor timely submitted electronic proposal but failed to timely submit identical paper proposal IAW the solicitation).

d. Agencies must retain late proposals unopened in the contracting office. FAR 15.208(g).

4. No "Firm Bid Rule." An offeror may withdraw its proposal at any time before award. FAR 15.208(e), FAR 52.215-1(c)(8). The agency, however, only has a reasonable time in which to accept a proposal. See

Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. 324, 91-1 CPD ¶ 242 (holding that 13 months was too long).

5. Lost proposals. The GAO will only recommend reopening a competition if a lost proposal is the result of systemic failure resulting in multiple or repetitive instances of lost information. Project Res., Inc., B-297968, Mar. 31, 2006, 2006 CPD ¶ 58.

6. Oral Presentations. FAR 15.102. A solicitation may require or permit, at the agency's discretion, oral presentations as part of the proposal process.

   a. Offerors may present oral presentations as part of the proposal process. See NW Ayer, Inc., B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154. They may occur at anytime in the acquisition process and are subject to the same restrictions as written information regarding timing and content. FAR 15.102(a). When oral presentations are required, the solicitation shall provide offerors with sufficient information to prepare them. FAR 15.102(d). The following are examples of information that may be put into the solicitation:

      (1) The types of information to be presented orally and the associated evaluation factors that will be used;

      (2) The qualifications for personnel required to provide the presentation;

      (3) Requirements, limitations and / or prohibitions on supplemental written material or other media;

      (4) The location, date, and time;

      (5) Time restrictions; or

      (6) Scope and content of exchanges between the Government and the offeror, to include whether or not discussions will be permitted. *Id.*

   b. The method and level of detail of the record of any oral presentation is within the discretion of the source selection authority. FAR 15.102(e). While the FAR does not require a particular method of recording what occurred during oral presentations, agencies must maintain a record adequate to permit meaningful review. See Checchi & Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD 132. (Practice tip: video recording of oral presentations helps capture both audio and visual

portions of the presentation and creates a record that it is helpful to refer back to when evaluating proposals and defending any protests.).

c. When an oral presentation includes information that will be included in the contract as a material term or condition, the information must be reduced to writing. The oral presentation cannot be incorporated by reference. FAR 15.102(f).

d. **Cautionary note**: Agency questions during oral presentations could be interpreted as discussions. In Global Analytic Info. Tech. Servs., Inc., B-298840.2, Feb. 6, 2007, 2007 CPD ¶ 57, GAO held if agency personnel comment on, or raise substantive questions about a proposal during an oral presentation, and afford an opportunity to revise a proposal in light of the agency's comments, then discussions have occurred.

7. Confidentiality

b. Prospective offerors may restrict the use and disclosure of information contained in their proposals by marking the proposal with an authorized restrictive legend. FAR 52.215-1(e).

c. Agencies must safeguard proposals from unauthorized disclosure. FAR 15.207(b).

VI. SOURCE SELECTION FAR SUBPART 15.3

A. The objective of source selection is to select the proposal that represents the best value to the Government (as defined by the Government). FAR §15.302. Because the agency's award decision must be consistent with the terms of the solicitation, the agency must ensure that its solicitation fully supports the "best value" objective.

B. Responsibilities FAR § 15.303; Army Source Selection Supplement, December 21, 2012 at Para 1.4.

C. Agency heads are responsible for source selection. The contracting officer is normally designated the source selection authority unless the agency head appoints another individual for a particular acquisition or group of acquisitions.

1. The Source Selection Authority must:

a. Establish an evaluation team, tailored for the particular acquisition. The composition of an evaluation team is left to the agency's discretion and the GAO will not review it absent a showing of conflict of interest or bias. See University Research Corp., B-253725.4, Oct. 26, 1993, 93-2 CPD ¶ 259; Symtech Corp., B-285358, Aug. 21, 2000, 2000 CPD ¶ 143; see also FAR 15.303 (providing that the source selection authority shall establish an evaluation team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers).

b. Approve the acquisition plan and source selection strategy.

c. Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation.

d. Consider the recommendation of the advisory boards and panels.

e. Select the source that provides the best value to the Government.

D. Proposal Evaluations Generally. FAR 15.305.

1. Evaluators must read and consider the entire proposal. Intown Properties, Inc., B-262236.2, B-262237.1, Jan. 18, 1996, 96-1 CPD ¶ 89 (record failed to demonstrate whether agency had considered information contained in offeror's best and final offer).

2. Evaluators must be consistent. If evaluators downgrade an offeror for a deficiency, they must downgrade other offerors for the same deficiency. See Park Sys. Maint. Co., B-252453, June 16, 1993, 93-1 CPD ¶ 466. If evaluators give credit to one offeror, they should give like credit to another offeror for the same provision. Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 (sustaining protest where the agency evaluated awardee's and the protester's proposals unequally by crediting the awardee for a specialty subcontractor, but not similarly crediting the protester who proposed the same subcontractor).

3. Evaluators must avoid double-scoring or exaggerating the importance of a factor beyond its disclosed weight. See J.A. Jones Mgmt. Servs., B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244; cf. Glasslock, Inc., B-299931, B-299931.2, Oct. 10, 2007, 2007 CPD ¶ 216 (reaffirming principle in the context of a RFQ). Compare Source One Mngt., Inc., B-278044, et al., June 12, 1998, 98-2 CPD ¶ 11 (stating that an agency is not precluded from considering an element of a proposal under more than

one evaluation criterion where the element is relevant and reasonably related to each criterion under which it is considered.)

4. Evaluators must evaluate compliance with the stated requirements. If an offeror proposes a better—but noncompliant—solution, the agency should amend the RFP and solicit new proposals, provided the agency can do so without disclosing proprietary data. FAR 15.206(d); see Beta Analytics, Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (1999); GTS Duratek, Inc., B-280511.2, B-285011.3, Oct. 19, 1998, 98-2 CPD ¶ 130; Labat-Anderson Inc., B-246071, Feb. 18, 1992, 92-1 CPD ¶ 193; cf. United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 (holding that substantial changes required the agency to cancel and reissue the RFP).

5. Evaluators may consider matters outside the offerors' proposals if their consideration of such matters is not unreasonable or contrary to the stated evaluation criteria. See Intermagnetics Gen. Corp. Recon., B-255741.4, Sept. 27, 1994, 94-2 CPD ¶ 119.

6. Evaluation factors and subfactors represent the key areas of importance and support the evaluators in making meaningful discrimination between and among competing offerors' proposals. Accordingly, the "relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file." FAR §15.305(a).

7. The agency's evaluation must be reasonable and consistent with the stated evaluation criteria. A common evaluation error occurs when the agency's evaluation is inconsistent with the solicitation's stated evaluation approach. The failure to use stated evaluation criteria, the use of unstated evaluation criteria, or unstated minimum criteria, in the evaluation of offerors' proposals is generally fatal to an agency's source selection decision.

    a. While the agency has significant discretion to determine which evaluation factors and subfactors to use, evaluators have **no** discretion to deviate from the solicitation's stated evaluation criteria. See, e.g., Y & K Maintenance, Inc., B-405310.6, Feb 2, 2012, 2012 CPD ¶ 93 (sustaining a protest because the agency failed to evaluate the experience of the awardee's key personnel consistent with the RFP's stated evaluation criteria).

    b. Protest sustained where solicitation provided that agency would conduct extensive testing on product samples, however agency failed to conduct testing on awardee's product and accepted

awardee's unsubstantiated representation its product met solicitation's requirements. Ashbury Intl. Group, Inc., B-401123: B-401123.2, June 1, 2009, 2009 CPD ¶ 140.

c. Protest sustained based on a flawed technical evaluation where the agency considered an undisclosed evaluation criterion--transition risk--in assuming that any non-incumbent contractor would likely cause mistakes in performance that would result in costs for the agency. Consolidated Eng'g Servs., Inc., B-311313, June 10, 2008, 2008 CPD ¶ 146.

8. Unstated Evaluation Factors

a. Agencies occasionally omit either: (1) significant evaluation factors and subfactors; (2) their relative importance; or (3) both. See Omniplex World Servs. Corp., B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7 (finding an agency improperly relied on an unstated minimum requirement to exclude an offeror from the competitive range). But see Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 (finding no prejudice even though the evaluation committee applied different weights to the evaluation factors without disclosing them); cf. Danville-Findorff, Ltd, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232 (finding no prejudice even though the agency listed the relative importance of an evaluation factor as 60 in the RFP, used 40 as the weight during evaluation, and used the "extra" 20 points for an unannounced evaluation factor). (Note that while the Government prevailed in these cases, it only prevailed because Government counsel clearly demonstrated to GAO that no prejudice befell the unsuccessful offerror due to these problems.).

b. While procuring agencies are required to identify the significant evaluation factors and subfactors in a solicitation, they are not required to identify every aspect of each factor that might be taken into account; rather, agencies may take into account considerations, even if unstated, that are reasonably related to or encompassed by the stated evaluation criteria. SCS Refrigerated Servs. LLC, B-298790, B-298790.1, B-298790.3, Nov. 29, 2006, 2006 CPD ¶ 186 (finding that the location of an offeror's back-up suppliers and the certainty of its relationships with back-up suppliers were reasonably related to a production capability/distribution plan subfactor which required offerors to provide detailed descriptions of their contingency plans for delays that could impact the delivery of food items to commissaries); NCLN20, Inc., B-287692, July 25, 2001, 2001 CPD ¶ 136 (finding that organizational and start-up

plans were logically related to and properly considered under a stated staffing plan factor).

c. The GAO will generally excuse an agency's failure to specifically identify more than one subfactor ***only if*** the subfactors are: (1) reasonably related to the stated criteria; and (2) of relatively equal importance. See Johnson Controls World Servs., Inc., B-257431, Oct. 5, 1994, 94-2 CPD ¶ 222 (finding that "efficiency" was reasonably encompassed within the disclosed factors); AWD Tech., Inc., B-250081.2, Feb. 1, 1993, 93-1 CPD ¶ 83 (finding that the agency properly considered work on similar superfund sites under the solicitation's past project experience factor even though the agency did not specifically list it as a subfactor).

d. The GAO, however, has held that an agency must disclose reasonably related subfactors if the agency gives them significant weight. See Lloyd H. Kessler, Inc., B-284693, May 24, 2000, 2000 CPD ¶ 96 (finding that agency was required to disclose in the solicitation a subfactor to evaluate a particular type of experience under the experience factor where the subfactor constituted 40 percent of the technical evaluation); Devres, Inc., B-224017, 66 Comp. Gen. 121, 86-2 CPD ¶ 652 (1986) (concluding that an agency must disclose subfactors that have a greater weight than reasonably related disclosed factors).

E. Cost and Price Evaluation.

1. Contracting activities should score cost/price in dollars and avoid schemes that: (1) mathematically relate cost to technical point scores; or (2) assign point scores to cost.

2. The cost to the government, expressed in terms of price or cost, shall be evaluated in every source selection. FAR § 15.304(c)(1). An agency's cost or price evaluation is directly related to the financial risk that the government bears because of the contract type it has chosen.

3. Evaluation scheme must be reasonable, and provide an objective basis for comparing cost to government. SmithKline Beecham Corp., B-283939, Jan. 27, 2000, 2000 CPD ¶ 19.

4. While cost or price to the Government need not be the most important evaluation factor, cost or price must always be a factor and taken into account in all award decisions, as well as all competitive range determinations.

5. Evaluating Firm Fixed-Price Contracts. FAR 15.305(a)(1).

a. Generally. When an agency contemplates the award of a fixed-price contract, the government's liability is fixed and the contractor bears the risk and responsibility for the actual costs of performance. FAR §16.202-1. As a result, the agency's analysis of price must take into account that the government's liability is contractually limited to the offeror's proposed price.

b. Price Reasonableness. A price reasonableness analysis determines whether an offeror's price is fair and reasonable to the government, and focuses primarily on whether the offered price is too high (not too low). CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207; SDV Solutions, Inc., B-402309, Feb. 1, 2010, 2010 CPD ¶ 48. The concern that an offeror submitted a price that is "too low" is not a valid part of a price reasonableness evaluation; similarly, the allegation that an awardee submitted an unreasonably low price does not provide a basis upon which to sustain a protest because there is no prohibition against an agency accepting a below-cost proposal for a fixed-price contract. See First Enter., B-292967, Jan. 7, 2004, 2004 CPD ¶ 11.

c. Comparing proposed prices usually satisfies the requirement to perform a price analysis because an offeror's proposed price is also its probable price. See Ball Technical Prods. Group, B-224394, Oct. 17, 1986, 86-2 CPD ¶ 465. But see Triple P Servs., Inc., B-271629.3, July 22, 1996, 96-2 CPD ¶ 30 (indicating that an agency may evaluate the reasonableness of the offeror's low price to assess its understanding of the solicitation requirements if the RFP permits the agency to evaluate offerors' understanding of requirements as part of technical evaluation).

d. Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. Price analysis can be difficult for indefinite quantity contracts. If an agency possesses historical data on billings under prior ID/IQ contracts, the agency may develop estimates based on these and apply it to the price analysis. R&G Food Serv., Inc., d/b/a Port-A-Pit Catering, B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶194. Another method is to construct notional or hypothetical work orders. Dept. of Agriculture—Reconsideration, B-296435.12, Nov. 3, 2005, 2005 CPD ¶ 201.

e. Price Realism. A price realism analysis is not ordinarily part of an agency's price evaluation because of the allocation of risk associated with a fixed-price contract. The analysis is entirely

optional unless expressly required by the solicitation. Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87.

(1) The price realism is to be used when, among other things, new requirements may not be fully understood by competing offerors. FAR § 15.404-1(d)(3); Analytic Strategies, B-404840, May 5, 2011, 2011 CPD ¶ 99 ("An agency may, in its discretion, provide for a price realism analysis for the purpose of assessing whether an offeror's price is so low as to evince a lack of understanding of the contract requirements or for assessing risk inherent in an offeror's approach.").

(2) To the extent an agency elects to perform a realism analysis as part of the award of a fixed-price contract, its purpose is not to evaluate an offeror's price, but to measure an offeror's understanding of the solicitation's requirements; further, the offered prices **may not be adjusted** as a result of the analysis. FAR §15.404-1(d)(3); IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 (sustaining protest challenging the agency's evaluation of offerors' price and cost proposals where the agency improperly adjusted upward portions of the protester's fixed-price proposals); ITT Elec. Sys. Radar Recon. & Acoustic Sys., B-405608, Dec. 5, 2011, 2012 CPD ¶ 7 ("Where, as here, an RFP provides for the award of a fixed price contract, the contracting agency may not adjust offerors' prices for purposes of evaluation.").

(3) Agencies may use a variety of methods to evaluate price realism, including analyzing pricing information proposed by the offeror and comparing proposals received to one another, to previously proposed or historically paid prices, or to an independent government estimate. The nature and extent of an agency's price realism analysis are within the agency's discretion unless the solicitation commits to a particular evaluation method. Gen. Dynamics, B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217.

(4) While it is within an agency's discretion to provide for a price realism analysis in awarding a fixed-price contract to assess understanding or risk, offerors competing for such an award must be given reasonable notice that a business decision to submit low pricing will be considered as reflecting on their understanding or the risk associated with

their proposals. Emergint Techs., Inc., B–407006, Oct. 18, 2012, 2012 CPD ¶295 at 5–6.

(1) Where there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, i.e., the offeror's ability and capacity to perform successfully at its offered price. Flight Safety Servs. Corp., B–403831, B–403831.2, Dec. 9, 2010, 2010 CPD ¶294 at 5.

(2) Absent a solicitation provision for a fixed-priced contract requiring a price realism analysis, no such analysis is required or permitted. PAE Government Services, Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶91.

6. Evaluating Cost Reimbursement Contracts

a. Cost Reasonableness Analysis. A cost reasonableness analysis is used to evaluate the reasonableness of individual cost elements when cost or pricing data, or information other than cost or pricing data, are required. FAR §15.404-1(a)(3), (4). As with price reasonableness, cost reasonableness is used to determine that the offeror's overall cost is fair and reasonable to the government (*i.e.*, not too high).

b. Cost Realism Analysis (Generally). When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed costs of contract performance are not considered controlling because, regardless of the costs proposed by an offeror, the government is bound to pay the contractor its reasonable, allowable, and allocable costs. FAR § 16.301-1; FAR 15.404-1(d); Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶112.

(1) Agencies should perform a cost realism analysis and evaluate an offeror's probable cost of accomplishing the solicited work, rather than its proposed cost.[3] See FAR 15.404-1(d); see also Kinton, Inc., B-228260.2, Feb. 5, 1988, 67 Comp. Gen. 226, 88-1 CPD ¶ 112 (indicating that it is improper for an agency to award based on probable

[3] Probable cost is the proposed cost adjusted for cost realism.

costs without a detailed cost analysis or discussions with the offeror).

(2) A cost realism analysis is used to determine the extent to which an offeror's proposed costs represent what the contract performance should cost, assuming reasonable economy and efficiency. FAR §§15.305(a)(1), 15.404-1(d)(1), (2); Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81; The Futures Group Int'l, B-281274.2, Mar. 3, 1999, 2000 CPD ¶ 147.

(3) Further, an offeror's proposed costs should be adjusted when appropriate based on the results of the cost realism analysis. FAR §15.404-1(d)(2)(ii); Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 (sustaining protest where, among other things, contracting officer failed to take into account the cost adjustments recommended by the agency's cost evaluation and instead considered only the offeror's proposed cost in the agency's source selection decision).

(4) If an agency needs to perform a cost realism analysis, the agency should base any adjustments to the offered price on identifiable costs to the government (e.g., in-house costs or life-cycle costs). See FAR 15.404-1(d); see also Futures Group Int'l, B-281274.5, Mar. 10, 2000, 134 (2000, 2000 CPD ¶ 148) (cost realism analysis must consider all information reasonably available at the time of evaluation, not just what offeror submits).

(5) A cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's proposal. FAR §15.404-1(d)(1); Advanced Commc'ns Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 3.

(6) Agencies should consider all cost elements. It is unreasonable to ignore unpriced "other cost items," even if the exact cost of the items is not known. See Trandes Corp., B-256975.3, Oct. 25, 1994, 94-2 CPD ¶ 221; cf.

Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

(7) Cost realism need not achieve scientific certainty; rather, it must provide some measure of confidence that the conclusions about the most probable costs are reasonable and realistic in view of other cost information reasonably available to the agency at the time of its evaluation. GAO reviews an agency's judgment only to see if the cost realism evaluation was reasonably based, not arbitrary, and adequately documented. Metro Mach. Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132.

(8) Agencies should evaluate cost realism consistently from one proposal to the next.

(9) However, agencies may not apply estimated adjustment factors mechanically. A proper cost realism analysis requires the agency to analyze each offeror's proposal independently based on its particular circumstances, approach, personnel, and other unique factors. See Honeywell Technology Solutions, Inc., B-292354, B-292388, Sept. 2, 2003, 2005 CPD ¶ 107; Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80.

(10) Agencies should also reconcile differences between the cost realism analysis and the technical evaluation scores. Information Ventures, Inc., B-297276.2 et al., Mar. 1, 2006, 2006 CPD ¶ 45 (agency praised technical proposal's "more than adequate" staffing while lowering hours of program director because of "unrealistic expectations").

(11) Agencies must document their cost realism analysis. See KPMG LLP, B-406409, et. seq., May 21, 2012, 2012 WL 2020396 (explaining that GAO "will sustain a protest where the cost realism analysis [is] not adequately documented").

F. Scoring Quality Factors (e.g., Technical and Management). See FAR 15.305(a).

1. Rating Methods. An agency may adopt any method it desires, provided the method is not arbitrary and does not violate any statutes or regulations. See BMY v. United States, 693 F. Supp. 1232 (D.D.C. 1988). At a minimum, an agency must give better proposals higher scores. See Trijicon, Inc., B-244546, Oct. 25, 1991, 71 Comp. Gen. 41, 91-2 CPD ¶ 375 (concluding that the agency failed to rate proposals that exceeded

the minimum requirements higher than those offering the minimum). An agency may give higher scores to proposals that exceed the minimum requirements, even if the RFP does not disclose how much extra credit will be given under each subfactor. See PCB Piezotronics, Inc., B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286.

2. Evaluation ratings, whether numeric, color, or adjectival, are but guides to, and not a substitute for, intelligent decision making. C & B Constr., Inc. B-401988.2, 2010, Jan. 6, 2010, 2010 CPD ¶ 1. Evaluation ratings are tools to assist source selection officials in evaluating proposals; they do not mandate automatic selection of a particular proposal. Jacobs COGEMA, LLC, B-290125.2, B-290125.3, Dec.18, 2002, 2003 CPD ¶ 16.

   a. **Numerical**.[4] An agency may use point scores to rate individual evaluation factors. But see C & B Constr., Inc. B-401988.2, 2010, Jan. 6, 2010CPD ¶ 1 (sustaining protest where record provided no contemporaneous tradeoff comparing offeror to awardee other than on the basis of point scores); Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002,2002 CPD ¶ 169 (sustaining protest where agency relied on point scores and failed to document in source selection decision any comparison of protester's lower-priced and lower-rated proposal to awardee's higher-priced, higher-rated proposal).

   b. **Adjectives**. An agency may use adjectives (e.g., excellent, good, satisfactory, marginal, and unsatisfactory)—either alone or in conjunction with other rating methods—to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. See Hunt Bldg. Corp., B-276370, June 6, 1997, 98-1 CPD ¶ 101 (denying a challenge to the assigned adjectival ratings where the evaluators adequately documented the different features offered by each firm and conveyed the comparative merits of the proposals to the selection official); see also FAR 15.305(a); Biospherics Incorp., B-278508.4, et al., Oct 6, 1998, 98-2 CPD ¶ 96 (holding that while adjectival ratings and point scores are useful guides to decision making, they must be supported by documentation of the relative differences between proposals).

   c. **Colors**. An agency may use colors in lieu of adjectives to indicate the degree to which an offeror's proposal meets the requisite standards for each evaluation factor. See Ferguson-Williams, Inc., B-231827, Oct. 12, 1988, 88-2 CPD ¶ 344.

[4] See supra note 2 for Army policy regarding use of numerical scoring.

d. **Dollars**. This system translates the technical evaluation factors into dollars that are added or subtracted from the evaluated price to get a final dollar price adjusted for technical quality. See DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69. Must be described in the solicitation's Section M, award criteria, to be utilized.

3. **But remember**: The focus in the source selection decision should be the underlying bases for the ratings, including a comparison of the advantages and disadvantages associated with the specific content of competing proposals, considered in a fair and equitable manner consistent with the terms of the RFP. See Gap Solutions, Inc., B-310564, Jan. 4, 2008, 2008 CPD¶ 26; Mechanical Equipment Company, Inc., et al., B-292789.2, et al., Dec. 15, 2003, 2004 CPD ¶ 192.

4. Agencies possess considerable discretion in evaluating proposals, and particularly in making scoring decisions. See MiTech, Inc., B-275078, Jan. 23, 1997, 97-1 CPD ¶ 208 (indicating that the GAO will not rescore proposals; it will only review them to ensure that the agency's evaluation is reasonable and consistent with the stated evaluation criteria); see also Control Systems Research, Inc., B-299546.2, Aug. 31, 2007, 2007 CPD ¶ 193 (stating that GAO will not substitute its judgment for that of the agency in evaluating management and technical areas); Antarctic Support Associates v. United States, 46 Fed. Cl. 145 (2000) (citing precedent of requiring "great deference" in judicial review of technical matters).

5. Narrative. An agency must provide a narrative to rate the strengths, weaknesses, and risks of each proposal. The narrative provides the basis for the source selection decision; therefore, the narrative should accurately reflect the proposals relative strengths, weaknesses, deficiencies and importance of these to the evaluation factors.

6. Agencies must reconcile adverse information when performing technical evaluation. See Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89; see also Carson Helicopter Servs., Inc., B-299720, B-299720.2, July 30, 2007, 2007 CPD ¶ 142 (stating that an agency may not accept at face value a proposal's promise to meet a material requirement when there is significant countervailing evidence that was, or should have been, reasonably known to the agency evaluators that should have created doubt whether the offeror would or could comply with that requirement).

7. Responsibility Concerns. A responsibility determination is not strictly part of the technical evaluation, but the evaluation process may include consideration of responsibility matters. See Applied Eng'g Servs., Inc., B-256268.5, Feb. 22, 1995, 95-1 CPD ¶ 108. If responsibility matters

are considered without a comparative evaluation of offers, however, a small business found technically unacceptable may appeal to the SBA for a COC. See Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38. If evaluators express concern with an offeror's responsibility, the evaluators should provide input to the contracting officer for use in making a responsibility determination. For a more detailed discussion on evaluating responsibility, see infra Subpart VI.P.

8. In DoD, the ratings are governed by the Department of Defense Source Selection Procedures, March 4, 2011, and the Army is governed by the Supplement (AS3) to the DoD Source Selection Procedures.

G. Past Performance Evaluation.

1. Past performance is generally required to be evaluated in all source selections for negotiated competitive acquisitions issued on or after January 1, 1999. See FAR §§ 15.304(c), 15.305(a)(2).

2. Past Performance Evaluation System. FAR Subpart 42.15.

a. Agencies must establish procedures for collecting and maintaining performance information on contractors. FAR 42.1502. These procedures should provide for input from technical offices, contracting offices, and end users. FAR 42.1503.

b. Agencies must prepare performance evaluation reports for each contract in excess of $150,000. FAR 42.1502.

3. Sources of Past Performance Information.

a. Agencies may consider their own past experience with an offeror rather than relying solely on the furnished references. See Birdwell Bros. Painting and Refinishing, B-285035, July 5, 2000, 2000 CPD ¶ 129.

b. An agency is not limited to considering past performance information provided by an offeror as part of its proposal, but may also consider other sources, such as:

(1) Contractor Performance Assessment Reporting System (CPARS) (http://www.cpars.csd.disa.mil/cparsmain.htm); and

(2) Past Performance Information Retrieval System (PPIRS) (www.ppirs.gov/).

(3) The primary purpose of the CPARS is to ensure that current and accurate data on contractor performance is available for use in source selections through PPIRS. Agencies use the CPARS database to collect and document contractor performance information consistent with the DoD CPARS Guide and the procedures at FAR 42.1503. Once the CPARS process is complete, this CPAR is loaded to PPIRS, which can be accessed by contracting officers and agency officials on source selection boards. .

c. In KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, an agency properly considered extrinsic past performance evidence when past performance was a disclosed evaluation factor. In fact, ignoring extrinsic evidence may be improper. See SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33; cf. Aviation Constructors, Inc., B-244794, Nov. 12, 1991, 91-2 CPD ¶ 448.

d. Information that is personally known by agency evaluators. Evaluators may consider and rely upon their personal knowledge in the course of evaluating an offeror's past performance. Del-Jen Int'l Corp., B-297960, May 5, 2006, 2006 CPD ¶ 81; NVT Techs., Inc., B-297524, B-297524.2, Feb. 2, 2006, 2006 CPD ¶ 36; see TPL, Inc., B-297136.10, B-297136.11, May 2005, 2005 CPD ¶ (finding that a conflict of interest does not exist where the same contracting agency or contracting agency employees prepare both an offeror's past performance reference and perform the evaluation of offerors' proposals).

e. "Too close at hand." In fact, GAO has determined that, in certain circumstances, agency evaluators involved in the source selection process ***cannot ignore*** past performance information of which they are personally aware. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶34; Northeast Military Sales., Inc., B-404153, Jan. 2011, 2011 CPD ¶2 (sustaining a protest challenging an agency's assessment of the awardee's past performance as exceptional where the agency failed to consider adverse past performance information of which it was aware).

f. GAO has charged an agency with responsibility for considering such outside information where the record has demonstrated that the information in question was "simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider this information." International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114; G. Marine Diesel; Phillyship, B-232619, Jan. 27, 1989, 89-1 CPD ¶90; GTS

Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130. The protester, however, must demonstrate that agency source selection officials ***were aware or should have been aware*** of the adverse information to sustain a protest on this basis. Carthage Area Hospital, Inc., B-402345, Mar. 16, 2010, 2010 CPD ¶ 90.

4. Past Performance Evaluation Considerations. An agency's evaluation of an offeror's past performance must be reasonable and consistent with the stated evaluation criteria. An agency's past performance evaluation should also take into account: (a) the relevance of an offeror's past performance; (b) the quality of an offeror's past performance; and (c) the source objectivity of an offeror's past performance information.

   a. Relevance of Past Performance. An agency must determine what if any weight to give to an offeror's past performance reference by determining its degree of relevance to the contract requirements.

      (1) "Same or Similar." When an RFP states the agency will evaluate whether an offeror's past performance reference is "same or similar" as part of determining relevancy, an agency must examine if the reference is same or similar in both size and scope to the awarded contract. Si-Nor, Inc., B-292748.2 et al., Jan. 7, 2004, 2004 CPD ¶ 10 (finding in part a prior contract which represented less than 7 percent of the solicitation requirements was not similar in size, scope, and complexity); Continental RPVs, B-292768.2, B-292678.3, Dec.11, 2003, 2004 CPD ¶ 56 (finding prior contracts no larger than 4 percent of the solicitation requirements were not similar or relevant); Kamon Dayron, Inc., B-292997, Jan. 15, 2004, 2004 CPD ¶ 101; Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70; KMR, LLC, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

      (2) Recency. An agency may consider the recency of an offeror's past performance reference as part of determining its overall relevance. See Knoll, Inc., B-294986.3, B-294986.4, Mar. 18, 2005, 2005 CPD ¶ 63; FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 (agency was not, per the terms of the RFP, required to consider offeror's past performance performed after solicitation closing date and before contract award).

      (3) Duration. An agency may consider the duration of an offeror's past performance reference as part of determining

its relevance. Chenega Tech. Prods., LLC., B-295451.5, June 22, 2005, 2005 CPD ¶ 123 (agency properly gave little weight to an offeror's past performance reference that had been performed for only one month); SWR, Inc.--Protest & Costs, B-294266.2 et al., Apr. 22, 2005, 2005 CPD ¶ 94; EastCo Bldg. Servs., Inc., B-275334, B-275334.2, Feb. 10, 1997, 97-1 CPD ¶ 83.

(4) Geographic Location. Geographic location can be considered as part of determining past performance relevance. Si-Nor, Inc., B-292748.2 et al., Jan. 7, 2004, 2004 CPD ¶ 10 (agency properly took into account the different geographic location of the prior worked performed when considering the relevance of the offeror's past performance).

(5) Different Technical Approach. The fact that an offeror utilized a different technical approach under the prior contract does not affect the relevance of an offeror's past performance. AC Techs., Inc., B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶26.

(6) All References. Unless a solicitation states otherwise, there is generally no requirement that an agency obtain or consider all of an offeror's references in the past performance evaluation. Dismas Charities, B-298390, Aug. 21, 2006, 2006 CPD ¶ 131; BTC Contract Servs., Inc., B-295877, May 11, 2005, 2005 CPD ¶ 96 (agency considered the most relevant seven references submitted).

b. Quality of Past Performance. An agency should first determine the relevance of an offeror's past performance reference before considering the quality of performance. In determining past performance quality, factors that may be considered include:

(1) timeliness of performance;

(2) cost control;

(3) customer satisfaction; and

(4) performance trends. Yang Enters., Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65; Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70.

c. Source Objectivity of Past Performance Information. An agency should also consider the source of an offeror's past performance information, to determine its objectivity. See Metro Machine Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 (agency properly considered the fact that prime contractor had furnished the past performance ratings for its proposed subcontractors); Hughes Missile Sys. Co., B-259255.4, May 12, 1995, 95-1 CPD ¶ 283.

d. Agencies must make rational—rather than mechanical—comparative past performance evaluations. In Green Valley Transportation, Inc., B-285283, Aug. 9, 2000, 2000 CPD ¶ 133, GAO found unreasonable an agency's use of absolute numbers of performance problems, without considering the "size of the universe of performance" where problems occurred. The GAO also sustained a protest in which the past performance evaluation merely averaged scores derived from the past performance questionnaires without additional analysis of the past performance data. Clean Harbors Environmental Services, Inc., Comp. Gen. B-296176.2, Dec. 9, 2005, 2005 CPD ¶222.

e. Lack of past performance history should not bar new firms from competing for government contracts. See Espey Mfg. & Elecs. Corp., B-254738, Mar. 8, 1994, 94-1 CPD ¶ 180; cf. Laidlaw Envtl. Servs., Inc., B-256346, June 14, 1994, 94-1 CPD ¶ 365 (permitting the agency to give credit for commercial past performance if it is equivalent to comparable prior government experience). Agencies must give a neutral rating to firms "without a record of relevant past performance." FAR 15.305(a)(2)(iv); see Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 (stating that while a neutral rating does not preclude award to a higher-priced, higher technically-rated offeror in a best value procurement, an agency may nevertheless award a contract to a lower-priced offeror without a past performance history where the solicitation provides that price alone would be considered in evaluating first time offerors); see also Blue Rock Structures, Inc., B-287960.2, B-287960.3, Oct. 10, 2001, 2001 CPD ¶ 184.

f. Past Performance Attribution; Using the Experience of Others. In many instances it is necessary for agencies to consider the proper attribution of an offeror's past performance references. As a general rule, the agency's evaluation should carefully examine the role(s) to be performed by the entity in question under the contract being awarded when determining the relevance of the past performance reference. Agencies may attribute the past

performance or experience of parents, affiliates, subsidiaries, officers, and team members, although doing so can be difficult. See U.S. Textiles, Inc., B-289685.3, Dec. 19, 2002, Oklahoma County Newspapers, Inc., B-270849, May 6, 1996, 96-1 CPD ¶ 213; Tuscon Mobilephone, Inc., B-258408.3, June 5, 1995, 95-1 CPD ¶ 267.

(1) Joint Venture Partners. Base Techs., Inc., B-293061.2, B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31 (agency may consider the references of one joint venture partner in evaluating a joint venture offeror's past performance where they are reasonably predictive of performance of the joint venture entity); JACO & MCC Joint Venture, LLP, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 (agency may consider the past performance history of individual joint venture partners in evaluating the joint venture's proposal where solicitation does not preclude that and both joint venture partners will be performing work under the contract).

(2) Subcontractors. AC Techs., Inc., B-293013, B-293013.2, Jan. 14, 2004, 2004 CPD ¶ 26 (agency reasonably considered the performance of contracts performed by awardee's subcontractor where nothing in the solicitation prohibited the agency from considering subcontractor's prior contracts). However, solicitation must permit attribution of subcontractor to the prime

(3) Individuals to a new company as offeror. United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶146 (agency properly considered the relevant experience and past performance history of key individuals and predecessor companies in evaluating the past performance of a newly-created company); see Interstate Gen. Gov't Contractors, Inc., B-290137.2, June 21, 2002, 2002 CPD ¶ 105; SDS Int'l, B-285822, B-285822.2, Sept. 29, 2000, 2000 CPD ¶ 167.

(4) Parent companies to a subsidiary as offeror. Aerosol Monitoring & Analysis, Inc., B-296197, June 30, 2005, 2005 CPD ¶ 132 (agency properly may attribute the past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror); Universal Bldg. Maint., Inc.,

B-282456, July 15, 1999, 99-2 CPD ¶ 32 (agency improperly attributed past performance of parent company or its other subsidiaries to awardee where record does not establish that parent company or subsidiaries will be involved in the performance of the protested contract).

g. Agencies may not downgrade past performance rating based on offeror's history of filing claims. See AmClyde Engineered Prods. Co., Inc., B-282271, June 21, 1999, 99-2 CPD ¶ 5. On 1 April 2002, the Office of Federal Procurement Policy instructed all federal agencies that the "filing of protests, the filing of claims, or the use of Alternative Dispute Resolution, must not be considered by an agency in either past performance or source selection decisions."[5]

h. Evaluating Past Performance or Experience. See John Brown U.S. Servs., Inc., B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 (comparing the evaluation of past performance and past experience).

i. Comparative Evaluations of Small Businesses' Past Performance.

(1) If an agency comparatively evaluates offerors' past performance, small businesses may not use the SBA's Certificate of Competency (COC) procedures to review the evaluation. See Nomura Enter., Inc., B-277768, Nov. 19, 1997, 97-2 CPD ¶ 148; Smith of Galeton Gloves, Inc., B-271686, July 24, 1996, 96-2 CPD ¶ 36.

(2) If an agency fails to state that it will consider responsibility-type factors, small businesses may seek a COC. See Envirosol, Inc., B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295; Flight Int'l Group, Inc., B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.

(3) If an agency uses pass/fail scoring for a responsibility-type factor, small businesses may seek a COC. See Clegg Indus., Inc., B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145; Meeks Disposal Corp., B-299576, B-299576.2, June 28, 2007, 2007 CPD ¶ 127 (stating in dicta a small business may seek a COC when an agency uses an acceptable/neutral/

[5] Memorandum, Angela B. Styles, Administrator, Office of Federal Procurement Policy, to Senior Procurement Executives, subject: Protests, Claims, and Alternative Dispute Resolution (ADR) as Factors in Past Performance and Source Selection Decisions (Apr. 1, 2002), available at http://www.whitehouse.gov/omb/procurement/publications/ pastperfmemo.pdf.

unacceptable rating scheme to evaluate corporate experience).

j. Agencies must clarify adverse past performance information when there is a clear basis to question the past performance information. See A.G. Cullen Constr., Inc., B-284049.2, Feb. 22, 2000, 2000 CPD ¶ 145. Agencies also must clarify adverse past performance if an offeror may be excluded from the competitive range as well as when an offeror has not previously had an opportunity to respond to adverse past performance. FAR 15.306(1)(i).

H. Products of the Evaluation Process.

1. Evaluation Report.

a. The evaluators must prepare a report of their evaluation. See Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; Amtec Corp., B-240647, Dec. 12, 1990, 90-2 CPD ¶ 482. The relative strengths, deficiencies, significant weaknesses, and risk supporting proposal evaluation shall be documented in the contract file. FAR 15.305(a); see also FAR 15.308 (establishing a similar requirement for the source selection decision).

b. The contracting officer should retain all evaluation records. See FAR 4.801; FAR 4.802; FAR 4.803; Southwest Marine, Inc., B-265865.3, Jan. 23, 1996, 96-1 CPD ¶ 56 (stating that where an agency fails to document or retain evaluation materials, it bears the risk that there is an inadequate supporting rationale in the record for the source selection decision and that GAO will conclude the agency had a reasonable basis for the decision); see also Technology Concepts Design, Inc. B-403949.2, March 25, 2011, 2011 CPD ¶ 78 (sustaining a protest where the agency did not provide adequate supporting rationale in the record for GAO to conclude that the agency's evaluation of the protester's proposal was reasonable).

c. If evaluators use numerical scoring, they should explain the scores. See J.A. Jones Mgmt Servs, Inc., B-276864, Jul. 24, 1997, 97-2 CPD ¶ 47; TFA, Inc., B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239; S-Cubed, B-242871, June 17, 1991, 91-1 CPD ¶ 571.

d. Evaluators should ensure that their evaluations are reasonable. See DNL Properties, Inc., B-253614.2, Oct. 12, 1993, 93-2 CPD ¶ 301.

2. Deficiencies. The initial evaluation must identify all parts of the proposals that fail to meet the government's minimum requirements.

3. Advantages and Disadvantages. The initial evaluation should identify the positive and negative aspects of acceptable proposals.

4. Questions and Items for Negotiation. The initial evaluation should identify areas where discussions are necessary/desirable.

I. Award Without Discussion.

1. An agency may not award on initial proposals if it:

a. States its intent to hold discussions in the solicitation; or

b. Fails to state its intent to award without discussions in the solicitation.

2. A proper award on initial proposals need not result in the lowest overall cost to the government (depending on the stated evaluation criteria).

3. To award without discussions, an agency must:

a. Give notice in the solicitation that it intends to award without discussions;

b. Select a proposal for award which complies with all of the material requirements of the solicitation;

c. Properly evaluate the selected proposal in accordance with the evaluation factors and subfactors set forth in the solicitation;

d. Not have a contracting officer determination that discussions are necessary; and

e. Not conduct discussions with any offeror, other than for the purpose of minor clarifications.

See TRI-COR Indus., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137.

4. Discussions v. Clarifications. FAR 15.306(a), (d).

(1) An agency may not award on initial proposals if it conducts discussions with any offeror. See To the Sec'y of the Navy,

B-170751, 50 Comp. Gen. 202 (1970); see also Strategic Analysis, Inc., 939 F. Supp. 18 (D.D.C. 1996) (concluding that communications with one offeror concerning the employment status of its proposed key personnel were discussions). But see Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996) (refusing to sustain a protest because the protester could not show that there was a "reasonable likelihood" that it would have been awarded the contract in the absence of the improper discussions).

(2) "Discussions" are "negotiations that occur after establishment of the competitive range that may, at the Contracting Officer's discretion, result in the offeror being allowed to revise its proposal." FAR 52.215-1(a); FAR 15.306(d). Discussions may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. FAR 15.306(d).

(a) The COFC has found "mutual exchange" a key element in defining discussions. See Cubic Defense Sys., Inc. v. United States, 45 Fed. Cl. 450 (2000) (finding that an offeror's submission of data that had been previously addressed and anticipated by an agency, without requests for further clarification by the agency, lacks the element of mutual exchange that is explicit in the FAR's treatment of discussions).

(b) The GAO has focused on "opportunity to revise" as the key element distinguishing discussions from clarifications. See MG Indus., B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17.

b. An agency, however, may "clarify" offerors' proposals.

(1) "Clarifications" are "limited exchanges between the Government and offerors that may occur when award without discussions is contemplated." FAR 15.306(a).

(a) Clarifications include:

(i) The opportunity to clarify—rather than revise—certain aspects of an offeror's

proposal (e.g., the relevance of past performance information to which the offeror has not previously had an opportunity to respond); and

(ii) The opportunity to resolve minor irregularities, informalities, or clerical errors.

(iii) The parties' actions control the determination of whether "discussions" have been held and not the characterization by the agency. See Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 (finding "discussions" occurred where awardee was allowed to revise its technical proposal, even though the source selection document characterized the communication as a "clarification").

c. Examples.

(1) The following are "discussions:"

(a) The substitution of resumes for key personnel. See University of S.C., B-240208, Sept. 21, 1990, 90-2 CPD ¶ 249; Allied Mgmt. of Texas, Inc., B-232736.2, May 22, 1989, 89-1 CPD ¶ 485. But see SRS Tech., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95; Park Tower Mgmt. v. United States, 67 Fed. Cl. 548 (2005) (holding that where agency contacted offeror to "clarify" whether it still intended to hire incumbent personnel, offeror's provision of additional information regarding its staffing and management plan did not transform the agency request into a discussion because the agency did not intend for the offeror to modify its proposal when it contacted the offeror).

(b) Allowing an offeror to explain a warranty provision that results in a revision of its proposal. See Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

(2) The following were not "discussions:"

(a) Audits. See Data Mgmt. Servs., Inc., B-237009, Jan. 12, 1990, 69 Comp. Gen. 112, 90-1 CPD ¶ 51; see also SecureNet Co. Ltd. v. United States, 72 Fed. Cl. 800 (2006) (holding that agency's request of offeror's labor rates were clarifications because the agency did not intend for the offeror to modify its proposal as a result of the contact).

(b) Allowing an offeror to correct a minor math error, correct a certification, or acknowledge a non-material amendment. See E. Frye Enters., Inc., B-258699, Feb. 13, 1995, 95-1 CPD ¶ 64; cf. Telos Field Eng'g, B-253492.2, Nov. 16, 1993, 93-2 CPD ¶ 275.

(c) A request to extend the proposal acceptance period. See GPSI-Tidewater, Inc., B-247342, May 6, 1992, 92-1 CDP ¶ 425.

(d) An inquiry as to whether figures in a proposal were stated on an annual or monthly basis that did not provide the offeror an opportunity to alter its proposal. Int'l Res. Recovery, Inc., v. United States, 64 Fed. Cl. 150 (2005).

(e) Responsibility inquiries. Gen. Dynamics—Ordnance & Tactical Sys., B-295987, B-295987.2, May 20, 2005, 2005 CPD ¶ 114 (holding that requests for information relating to an offeror's responsibility, rather than proposal evaluation, does not constitute discussions); see also Computer Sciences Corp., B-298494.2, et al., May 10, 2007, 2007 CPD ¶ 103 (stating that exchanges concerning an offeror's small business subcontracting plan are not discussions when they are evaluated as part of an agency's responsibility determination, but that such exchanges constitute discussions when incorporated into an agency's technical evaluation plan); Overlook Sys. Techs., Inc., B-298099.4, B-298099.5, Nov. 28, 2006, 2006 CPD ¶ 185 (analogizing pre-award exchanges reference the adequacy of an offeror's mitigation plan to a responsibility determination, which does not constitute discussions).

(f) See Dyncorp Int'l LLC v. United States, 76. Cl. 528 (2007) (providing a lengthy discussion on the differences between clarifications and discussions to conclude that three evaluation notices requesting information related to mission capability were not discussions).

d. Minor clerical errors should be readily apparent to both parties. If the agency needs an answer before award, the question probably rises to the level of discussions. See CIGNA Gov't Servs., LLC, B-297915.2, May 4, 2006, 2006 CPD 73 ¶ (finding that request to confirm hours in level of effort template that results in an offeror stating the hours were "grossly overstated" and the provision of corrections constituted discussions); University of Dayton Research Inst., B-296946.6, June 15, 2006, 2006 CPD ¶ 102 (finding that the correction of evaluation rates and reconciliation of printed and electronic versions of subcontractor rates are not clarifications where several offerors thereby make dozens of changes to the rates initially proposed).

J. Determination to Conduct Discussions.

1. To conduct discussions with one or more offerors after stating an intent to award without discussions, the contracting officer must find that discussions are necessary and document this conclusion in writing. 10 U.S.C. § 2305(b); 41 U.S.C. § 253a(b)(2)(B)(i); FAR 15.306(a)(3).

2. Statutes and implementing regulations provide little guidance for making this determination. A contracting officer should consider factors such as favorable but noncompliant proposals, unclear proposals, incomplete proposals, unreasonable costs/prices, suspected mistakes, and changes/ clarifications to specifications. See Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ 339.

3. The agency has wide discretion in deciding not to hold discussions, and an agency's decision to ***not*** hold discussions is generally not a matter that GAO will review. Booz Allen Hamilton, Inc., B-405993, B-40599.2, Jan 19, 2012, 2012 CPD ¶ 30.[6]

K. Communications. FAR 15.306(b).

[6] But see the DoD DPAP memorandum dated 8 January 2008 directing that awards should be made without discussions only in limited circumstances, generally routine, simple procurements. See http://www.acq.osd.mil/dpap/policy/policyvault/2007-1480-DPAP.pdf

1. "Communications" are limited "exchanges of information, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range." FAR 15.306(b).

   a. These exchanges are limited to offerors whose:

      (1) past performance information is preventing them from being in the competitive range, and

      (2) exclusion / inclusion in the competitive range is uncertain.

   b. The communications should "enhance Government understanding . . . ; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process." FAR 15.306(b)(2).

   c. Communications "are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range." FAR 15.306(b)(2) and (3). Interestingly, FAR 15.306(b)(3)(i) references FAR 14.407, mistakes in bids. Therefore, mistakes in bid case law can be used to help Contracting Officers determine when they can engage in communications to help establish the competitive range.

2. The parties, however, cannot use communications to permit an offeror to revise its proposal. FAR 15.306(b)(2).

3. The contracting officer must communicate with offerors who will be excluded from the competitive range because of adverse past performance information. Such communications must give an offeror an opportunity to respond to adverse past performance information to which it has not previously had an opportunity to respond. FAR 15.306(b).

4. The contracting officer may also communicate with offerors who are neither clearly in nor clearly out of the competitive range. FAR 15.306(b)(1)(ii). The contracting officer may address "gray areas" in an offeror's proposal (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes). FAR 15.306(b)(3).

L. Establishing the Competitive Range. FAR 15.306(c).

1. The competitive range is the group of offerors with whom the contracting officer will conduct discussions and from whom the agency will seek revised proposals.

2. The contracting officer (or SSA) may establish the competitive range any time after the initial evaluation of proposals. See SMB, Inc., B-252575.2, July 30, 1993, 93-2 CPD ¶ 72.

3. The contracting officer must consider all of the evaluation factors (***including cost/price***) in making the competitive range determination. See Kathpal Techs., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6; Arc–Tech, Inc., B-400325.3, Feb. 19, 2009, 2009 CPD ¶ 53.

   a. The contracting officer may exclude a proposal from the competitive range despite its lower cost or the weight accorded cost in the RFP if the proposal is technically unacceptable. See Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

   b. The contracting officer may exclude an unacceptable proposal that requires major revisions to become acceptable if including the proposal in the competitive range would be tantamount to allowing the offeror to submit a new proposal. See Harris Data Commc'ns v. United States, 2 Cl. Ct. 229 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983); see also Strategic Sciences and Tech., Inc., B-257980, 94-2 CPD ¶ 194 (holding that it was reasonable for the agency to exclude an offeror who proposed inexperienced key personnel—which was the most important criteria—from the competitive range); InterAmerica Research Assocs., Inc., B-253698.2, Nov. 19, 1993, 93-2 CPD ¶ 288 (holding that it was proper for the agency to exclude an offeror that merely repeated back language from solicitation and failed to provide required information).

4. The contracting officer must include all of the "most highly rated proposals" in the competitive range unless the contracting officer decides to reduce the competitive range for purposes of efficiency. See FAR 15.306(c)(2).

   a. The GAO ordinarily gives great deference to the agency. To prevail, a protester must show that the decision to exclude it was: (1) clearly unreasonable; or (2) inconsistent with the stated evaluation factors. See Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307; cf. Intertec Aviation, B-239672, Sept. 19, 1990, 69 Comp. Gen. 717, 90-2 CPD ¶ 232 (holding that the agency improperly excluded an offeror from the competitive range where its alleged technical deficiencies were minor, its cost was competitive, and the agency's action seriously reduced available competition).

b. If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out. In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. With the FAR rewrite in 1997, the drafters intended to permit a competitive range more limited than under the "reasonable chance of receiving award" standard. See SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.

5. The contracting officer may limit the number of proposals in the competitive range to "the greatest number that will permit an efficient competition among the most highly rated offerors" **only if**:

   a. The agency notified offerors in the solicitation that the contracting officer may limit the competitive range for purposes of efficiency; and

   b. The contracting officer determines that the number of proposals the contracting officer would normally include in the competitive range is too high to permit efficient competition.

6. The contracting officer must continually reassess the competitive range. If after discussions have begun, an offeror is no longer considered to be among the most highly rated, the contracting officer may eliminate that offeror from the competitive range despite not discussing all material aspects in the proposal. The excluded offeror will not receive an opportunity to submit a proposal revision. FAR 15.306(d)(3).

7. Common Errors.

   a. Reducing competitive range to one proposal.

      (1) A competitive range of one is not "per se" illegal or improper. See Clean Servs. Co., B-281141.3, Feb. 16, 1999, 99-1 CPD ¶ 36; SDS Petroleum Prods., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 (concluding that the new standard for establishing the competitive range does not preclude a range of one per se).

      (2) However, a contracting officer's decision to reduce a competitive range to one offeror will receive "close scrutiny." See L-3 Commc'ns EOTech., Inc., 83 Fed. Cl. 643, 2008; Dynamic Mktg. Servs., B-279697, July 13, 1998, 98-2 CPD ¶ 84.

(3) Under FAR 52.215-20 and DFARS 252.215-7008, Agencies may be required to request certified cost and pricing data from the lone offeror in certain circumstances.

b. Eliminating a technically acceptable proposal from the competitive range without taking into account or evaluating cost or price. See Kathpal Techs., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6; SCIENTECH, Inc., B-277805.2, Jan. 20, 1998, 98-1 CPD ¶ 33.

c. Excluding an offeror from the competitive range for omissions that the offeror could easily correct during discussions. See Dynalantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.

d. Using predetermined cutoff scores. See DOT Sys., Inc., B-186192, July 1, 1976, 76-2 CPD ¶3.

e. Excluding an offeror from the competitive range for "nonresponsiveness."

(1) An offeror may cure a material defect in its initial offer during negotiations; therefore, material defects do not necessarily require exclusion from the competitive range. See ManTech Telecomm & Info. Sys. Corp., 49 Fed. Cl. 57 (2001).

(2) The concept of "responsiveness" is incompatible with the concept of a competitive range. See Consolidated Controls Corp., B-185979, Sept. 21, 1976, 76-2 CPD ¶ 261.

M. Conducting Discussions. FAR 15.306(d).

1. The contracting officer must conduct oral or written discussions with each offeror in the competitive range. FAR 15.306(d)(1).

a. The contracting officer may not hold discussions with only one offeror. See Computer Sciences Corp., B-298494.2, et al., May 10, 2007, 2007 CPD ¶ 103 (finding that when an agency conducts discussions with one offeror, it must conduct discussions with all other offerors whose proposals are in the competitive range, and those discussions must be meaningful; that is, the discussions must identify deficiencies and significant weaknesses in each offeror's proposal); Raytheon Co., B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37 (stating that the "acid test" of whether discussions have been held is whether an offeror was provided the opportunity to modify/revise its proposal).

b. The contracting officer may hold face-to-face discussions with some—but not all—offerors, provided the offerors with whom the contracting officer did not hold face-to-face discussions are not prejudiced. See Data Sys. Analysts, Inc., B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.

c. In a lowest-priced, technically acceptable solicitation, an agency is not required to conduct discussions with an offeror already determined technically acceptable, provided that offeror is given the opportunity to submit a revised proposal. Commercial Design Grp., Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 (finding there was no prejudice where agency held discussions with deficient offerors but not technically acceptable protestor in a LPTA acquisition).

2. The contracting officer determines the scope and extent of the discussions; however, it is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. See The Boeing Co., B–311344 et al., June 18, 2008, 2008 CPD ¶114 at 49; Biospherics, Inc. v. United States, 48 Fed. Cl. 1 (2000); Multimax, Inc, et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 ("mechanistic" application of formula); AT&T Corp, B-299542.2, B-299542.4, Nov. 16, 2007, 2007 CPD ¶ (concluding discussions not reasonable where agency determines protester's staffing is unreasonable but fails to identify the scope of the agency's concerns in discussions.

a. The contracting officer must discuss any matter that the RFP states the agency will discuss. See Daun-Ray Casuals, Inc., B-255217.3, 94-2 CPD ¶ 42 (holding that the agency's failure to provide an offeror with an opportunity to discuss adverse past performance information was improper—even though the offeror received a satisfactory rating—because the RFP indicated that offerors would be allowed to address unfavorable reports).

b. The contracting officer must tailor discussions to the offeror's proposal. FAR 15.306(d)(1), (e)(1); see Metropolitan Interpreters and Translators, Inc., B-403912.4, May 31, 2011, 2012 CPD ¶ 130 ("Although discussions may not be conducted in a manner that favors one offeror over another, discussions need not be identical among offerors; rather, discussions are to be tailored to each offeror's proposal.").

c. At a minimum, the contracting officer must notify each offeror in the competitive range of deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not

yet had the opportunity to respond. FAR 15.306(d)(3). An agency failed to conduct meaningful discussions when discussions were limited to cost proposals and the discussions failed to identify significant weaknesses or deficiencies identified in the protester's technical proposal. Burchick Constr. Co., B-400342, Oct. 6, 2008, 2009 CPD ¶ 203. But see FAR 15.306(d)(5) (indicating that the contracting officer may eliminate an offeror's proposal from the competitive range after discussions have begun, even if the contracting officer has not discussed all material aspects of the offeror's proposal or given the offeror an opportunity to revise it).

(1) Deficiencies.

(a) The FAR defines a "deficiency" as "a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level." FAR 15.001.

(b) The contracting officer does ***not*** have to specifically identify each deficiency. Instead, the contracting officer merely has to lead the contractor into areas requiring improvement. See Du & Assocs., Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD ¶ 156; Arctic Slope World Servs., Inc., B-284481, B-284481.2, Apr. 27, 2000, 2000 CPD ¶ 75. An agency's failure to advise an offeror, in some way, of material proposal deficiencies vitiates the meaningfulness of the discussions. There is, however, no requirement that all areas of a proposal which could have a competitive impact be addressed in discussions. Dynacs Eng'g Co., Inc. v. United States, 48 Fed. Cl. 124 (2000); see Info. Sys. Tech. Corp., B-289313, Feb. 5, 2002, 2002 CPD ¶ 36 (stating that agencies need not conduct all encompassing discussions, or discuss every element of a proposal receiving less than a maximum rating).

(c) The contracting officer does ***not*** have to point out a deficiency if discussions cannot improve it. See Specialized Tech. Servs., Inc., B-247489, B-247489.2, June 11, 1992, 92-1 CPD ¶ 510; Eng'g Inc., B-257822, B-257822.5, Aug. 18, 1995, 95-2 CPD ¶ 130 (business experience).

(d) The contracting officer does ***not*** have to inquire into omissions or business decisions on matters clearly addressed in the solicitation. See Wade Perrow Constr., B-255332.2, Apr. 19, 1994, 94-1 CPD ¶ 266; Nat'l Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16.

(e) The contracting officer does ***not*** have to actually "bargain" with an offeror. See Northwest Reg'l Educ. Lab., B-222591.3, Jan. 21, 1987, 87-1 CPD ¶ 74. But cf. FAR 15.306(d) (indicating that negotiations may include bargaining).

(2) Significant Weaknesses.

(a) A "significant weakness" is "a flaw that appreciably increases the risk of unsuccessful contract performance." FAR 15.001. Examples include:

(i) Flaws that cause the agency to rate a factor as marginal or poor;

(ii) Flaws that cause the agency to rate the risk of unsuccessful contract performance as moderate to high; and

(iii) Relatively minor flaws that have a significant cumulative impact (e.g., minor flaws in several areas that impact the overall rating).

(b) The contracting officer does ***not*** have to identify every aspect of an offeror's technically acceptable proposal that received less than a maximum score. See Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222; SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462, recon. denied, B-252476.3, Oct. 27, 1993, 93-2 CPD ¶ 251.

(c) In addition, the contracting officer does ***not*** have to advise an offeror of a minor weakness that the agency does not consider significant, even if it subsequently becomes a determinative factor between two closely ranked proposals. See Brown & Root, Inc. & Perini Corp., A Joint Venture, B-270505.2, Sept. 12, 1996, 96-2 CPD ¶ 143; cf.

Prof'l Servs. Grp., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 (holding that the discussions were inadequate where "deficient" staffing was not revealed because the agency perceived it to be a mere "weakness").

(d) The contracting officer does ***not*** have to inform offeror that its cost/price is too high where the agency does not consider the price unreasonable or a significant weakness or deficiency. See JWK Int'l Corp. v. United States, 279 F.3d 985 (Fed. Cir. 2002); SOS Interpreting, Ltd., B-287477.2, May 16, 2001, 2001 CPD ¶ 84.

(3) Other Aspects of an Offeror's Proposal. Although the FAR used to require contracting officers to discuss other material aspects, the rule now is that contracting officer are "encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award." FAR 15.306(d)(3).

d. Since the purpose of discussions is to maximize the agency's ability to obtain the best value, the contracting officer should do more than the minimum necessary to satisfy the requirement for meaningful discussions. See FAR 15.306(d)(2).

e. To satisfy the requirement for meaningful discussions, an agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required, nor is the agency obligated to "spoon-feed" an offeror as to each and every item that could be revised to improve its proposal. L–3 Commc'ns Corp ., BT Fuze Prods. Div., B–299227, B–299227.2, Mar. 14, 2007, 2007 CPD ¶83 at 19; Robbins–Gioia, LLC, B-402199 et al., Feb. 3, 2010, 2010 CPD ¶ 67 n.5; Labarge Elecs., B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58 at 6 ("While agencies generally are required to conduct meaningful discussions by leading offerors into the areas of their proposals requiring amplification, this does not mean that an agency must 'spoon-feed' an offeror as to each and every item that must be revised, added, deleted, or otherwise addressed to improve a proposal.").

3. Limitations on Exchanges.

a. FAR Limitations. FAR 15.306(e).

(1) The agency may not favor one offeror over another.

(2) The agency may not disclose an offeror's technical solution to another offeror.[7]

(3) The agency may not reveal an offeror's prices without the offeror's permission.

(4) The agency may not reveal the names of individuals who provided past performance information.

(5) The agency may not furnish source selection information in violation of the Procurement Integrity Act (41 U.S.C.§ 423).

b. Other Prohibitions. The FAR no longer includes specific prohibitions on technical leveling, technical transfusion, and auctioning; however, the Procurement Integrity Act and the Trade Secrets Act still apply.

(1) Technical leveling involves helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion. See Creative Mgmt. Tech., Inc., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

(2) Technical Transfusion. Technical transfusion involves the government disclosure of one offeror's proposal to another to help that offeror improve its proposal.

(3) Auctioning.

(a) Auctioning involves the practice of promoting price bidding between offerors by indicating the price offerors must beat, obtaining multiple proposal revisions, disclosing other offerors' prices, etc.

(b) Auctioning is not inherently illegal. See Nick Chorak Mowing., B-280011.2, Oct. 1, 1998, 98-2 CPD ¶ 82. Moreover, the GAO usually finds that preserving the integrity of the competitive process outweighs the risks posed by an auction. See Navcom Defense Elecs., Inc., B-276163.3, Oct. 31,

[7] This prohibition includes any information that would compromise an offeror's intellectual property (e.g., an offeror's unique technology or an offeror's innovative or unique use of a commercial item). FAR 15.306(e)(2).

1997, 97-2 CPD ¶ 126; Baytex Marine Commc'n, Inc., B-237183, Feb. 8, 1990, 90-1 CPD ¶ 164.

(c) The government's estimated price will not be disclosed in the RFP.[8] However, FAR 15.306(e)(3) allows discussion of price. See Nat'l Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16. While FAR § 15.306(e)(3) gives the contracting officer the discretion to inform an offeror its price is too high (or too low), it does not require that the contracting officer do so. HSG Philipp Holzmann Technischer, B-289607, Mar. 22, 2002, 2002 CPD ¶ 67.

c. Fairness Considerations.

(1) Discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. See Metro Mach. Corp., B-281872.2, Apr. 22, 1999, 99-1 CPD ¶ 101 (finding that a question about a proposal that did not reasonably put the offeror on notice of agency's actual concern was not adequate discussions); see also Velos, Inc., B-400500 et al. Nov. 28, 2008, 2010 CPD ¶ 3 (Agency agreed software license was acceptable, then rejected the protester's revised proposal because the agency, after final proposal submission, determined same license was unacceptable); SRS Tech., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 (concluding that the Navy mislead the offeror by telling it that its prices were too low when all it needed was better support for its offered prices); Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 (concluding that the agency misled the offeror and caused it to raise its price by telling it that its price was below the government estimate); DTH Mgmt. Grp., B-252879.2, Oct. 15, 1993, 93-2 CPD ¶ 227 (concluding that the agency mislead an offeror by telling it that its price was below the government estimate when it knew that the government estimate was faulty); Creative Info. Techs., B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 (holding that discussions must deal with the underlying cause and that notifying an offeror that its price was overstated was insufficient).

[8] In the area of construction contracting the FAR requires disclosure of the magnitude of the project in terms of physical characteristics and estimated price range, but not a precise dollar amount (e.g., a range of $100,000 to $250,000). See FAR 36.204.

(2) The contracting officer must provide similar information to all of the offerors. See Securiguard, Inc., B-249939, Dec. 21, 1992, 93-1 CPD ¶ 362; Grumman Data Sys. Corp. v. Sec'y of the Army, No. 91-1379, slip op. (D.D.C. June 28, 1991) (agency gave out answers, but not questions, misleading other offerors); SeaSpace Corp., B-241564, Feb. 15, 1991, 70 Comp. Gen. 268, 91-1 CPD ¶ 179.

(3) All offerors must be given the opportunity to revise their proposals following discussions. Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232 (sustaining a protest where discussions were conducted but the protester was nor provided with an opportunity to address and revise a significant weakness identified in its proposal, even though an awardee had been given the opportunity to revise its proposal).

N. Final Proposal Revisions (Formerly Known as Best and Final Offers or BAFOs). FAR 15.307.

1. Requesting final proposal revisions concludes discussions. The request must notify offerors that:

a. Discussions are over;

b. They may submit final proposal revisions to clarify and document any understandings reached during negotiations;

c. They must submit their final proposal revisions in writing;

d. They must submit their final proposal revisions by the common cutoff date/time; and

e. The government intends to award the contract without requesting further revisions.

2. Agencies do not have to reopen discussions to address deficiencies introduced in the final proposal revision. Sabre Systems, Inc., B-402040.2, B-402040.3, June 1, 2010, 2010 CPD ¶ 128; Smith Detection, Inc., B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5; Ouachita Mowing, Inc., B-276075, May 8, 1997, 97-1 CPD ¶ 167.

a. Agencies, however, must reopen discussions in appropriate cases. See Al Long Ford, B-297807, Apr. 12, 2006, 2006 CPD ¶ 67 (finding that an agency must reopen discussion if it realizes, while reviewing an offeror's final proposal revision, that a problem in the

initial proposal was vital to the source selection decision but not raised with the offeror during discussion); TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 (holding that the agency erred in not conducting additional discussions where there were significant inconsistencies between technical and cost proposals that required resolution); cf. Dairy Maid Dairy, Inc., B-251758.3, May 24, 1993, 93-1 CPD ¶ 404 (holding that a post-BAFO amendment that changed the contract type from a requirements contract to a definite quantity contract was a material change that required a second round of BAFOs); Harris Corp., B-237320, Feb. 14, 1990, 90-1 CPD ¶ 276 (holding that the contracting officer properly requested additional BAFOs after amending the RFP).

b. Agencies may request additional FPRs even if the offerors' prices were disclosed through an earlier protest if additional FPRs are necessary to protect the integrity of the competitive process. BNF Tech., Inc., B-254953.4, Dec. 22, 1994, 94-2 CPD ¶ 258.

3. If the agency reopens discussions with one offeror, the agency must reopen discussions with all of the remaining offerors. See Lockheed Martin, B-292836.8 et al., Nov. 24, 2004, 2005 CPD ¶ 27; Int'l Res. Grp., B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

O. Source Selection Decision. FAR § 15.308.

1. Agencies must evaluate final proposals using the evaluation factors set forth in the solicitation.

a. Bias in the selection decision is improper. See Latecoere Int'l v. United States, 19 F.3d 1342 (11th Cir. 1994) (stating that bias against a French firm "infected the decision not to award it the contract").

b. There is no requirement that the same evaluators who evaluated the initial proposals also evaluate the final proposals. See Med. Serv. Corp. Int'l, B-255205.2, Apr. 4, 1994, 94-1 CPD ¶ 305.

2. The source selection decision should be based on the solicitation's evaluation factors and significant subfactors that were previously tailored to the current acquisition. The solicitation must have already notified offerors in the solicitation whether award will be made on the basis of lowest priced, technically acceptable proposals, or on the basis of a price/technical (or cost/technical) tradeoff analysis. FAR §§ 15.101-1, 15.101-2; see also AMC Pam. 715-3. While agencies have broad discretion in making source selection decisions, their decisions must be

rationale and consistent with the evaluation criteria in the RFP. See Liberty Power Corp., B-295502, Mar. 14, 2005, 2005 CPD ¶ 61 (stating that agencies may not announce one basis for evaluation and award in the RFP and then evaluate proposals and make award on a different basis); Marquette Med. Sys. Inc., B-277827.5, B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90; Found. Health Fed. Servs., Inc., B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3; see also FAR 15.305(a).

3. A proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis of award. Stewart Distribs., B-298975, Jan. 17, 2007, 2007 CPD ¶ 27; Farmland Nat'l Beef, B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31. If the agency wants to accept an offer that does not comply with the material solicitation requirements, the agency must issue a written amendment and give all of the remaining offerors an opportunity to submit revised proposals. FAR 15.206(d); see Beta Analytics Int'l, Inc. v. U.S., 44 Fed. Cl. 131 (U.S. Ct Fed. Cl. 1999); 4th Dimension Software, Inc., B-251936, May 13, 1993, 93-1 CPD ¶ 420.

4. The source selection process is inherently subjective.

   a. The fact that an agency reasonably might have made another selection does not mean that the selection made was unreasonable. See Red R. Serv. Corp., B-253671.4, Apr. 22, 1994, 94-1 CPD ¶ 385. However, the decision must be based on accurate information. See CRA Associated, Inc., B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

   b. Point scoring techniques do not make the evaluation process objective. See VSE Corp., B-224397, Oct. 3, 1986, 86-2 CPD ¶ 392. Therefore, the RFP should not state that award will be made based on the proposal receiving the most points. See Harrison Sys. Ltd., B-212675, May 25, 1984, 84-1 CPD ¶ 572. See also DOD Source Selection Guide pg. 12 which prohibits using numerical weighting of factors and subfactors. https://acc.dau.mil/docs/dodssp/Source%20selelction%20document%20(3).pdf

5. A cost/technical trade-off analysis is essential to any source selection decision using a trade-off (rather than a lowest-priced, technically acceptable) basis of award. See Special Operations Grp., Inc., B-287013; B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

a. Agencies should make the cost/technical tradeoff decision after receiving final proposals if final proposals were requested. See Halter Marine, Inc., B-255429, Mar. 1, 1994, 94-1 CPD ¶ 161.

b. A "cost/technical trade-off" evaluation requires evaluation of differences in technical merit beyond the RFP's minimum requirements. See Johnson Controls World Servs., Inc., B-281287.5 et al., June 21, 1999, 2001 CPD ¶ 3.

6. Agencies have broad discretion in the source selection process, but the source selection decision must be adequately documented, and it must be consistent with the evaluation criteria and applied consistently to each offerors' proposal.

a. Agencies have broad discretion in making cost/technical tradeoffs, so long as they are rational and consistent with the stated evaluation criteria and adequately documented. See Chenega Tech. Prods., LLC, B-295451.5, June 22, 2005, 2005 CPD ¶123; Leach Mgmt. Consulting Corp., B-292493.2, Oct. 3, 2003, 2003 CPD ¶175.

b. The source selection decision document should also demonstrate that the evaluation criteria was applied equally to all offerors. See Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶141 (sustaining a protest when the agency evaluated the awardee's and the protestor's proposals unequally by crediting the awardee for the experience and past performance of a subcontractor but not similarly crediting the protester, who had proposed the same subcontractor).

c. In the cost/technical trade off the extent to which one is sacrificed for the other is tested for rationality and consistency with the stated evaluation factors. See Tenderfoot Sock Co., Inc., B-293088.2, July 30, 2004, 2004 CPD ¶ 147; see also Synectic Solutions, Inc., B-299086, Feb. 7, 2007, 2007 CPD ¶ 36 (stating that an agency retains the discretion to select a higher priced, higher technically rated proposal if doing so is reasonably found to be in the government's best interests and is consistent with the solicitation's stated evaluation scheme); Widnall v. B3H Corp., 75 F. 3d 1577 (Fed. Cir. 1996) (stating that "review of a best value agency procurement is limited to independently determining if the agency's decision was grounded in reason").

d. More than a mere conclusion, however, is required to support the analysis. See Shumaker Trucking and Excavating Contractors, B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 (finding the award

decision unreasonable where the "agency mechanically applied the solicitation's evaluation method" and provided no analysis of the advantages to the awardee's proposal); Technology Concepts Design, Inc. B-403949.2, March 25, 2011, 2011 CPD ¶ 78 (sustaining a protest where the agency did not provide adequate supporting rationale in the record for GAO to conclude that the agency's evaluation of the protester's proposal was reasonable); Beacon Auto Parts, B-287483, June 13, 2001, 2001 CPD ¶ 116 (finding that a determination that a price is "fair and reasonable" doesn't equal a best-value determination); ITT Fed. Svs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76; Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181.

e. Beware of tradeoff techniques that distort the relative importance of the various evaluation criteria (e.g., "Dollars per Point"). See Billy G. Bassett, B-237331, Feb. 20, 1990, 90-1 CPD ¶ 195; T. H. Taylor, Inc., B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.

f. A cost/technical tradeoff analysis may consider relevant matters not disclosed in the RFP as tools to assist in making the tradeoff. See Sys. Research and Applications Corp, B-257939, Feb. 28, 1995, 95-1 CPD ¶ 214; Advanced Mgmt., Inc., B-251273.2, Apr. 2, 1993, 93-1 CPD ¶ 288 (holding that it is permissible to consider that loss of efficiency in awarding to a new contractor would reduce effective price difference between the contractor and the incumbent).

7. The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. The decision must be the SSA's ***independent judgment.*** FAR 15.308. However, the SSA need not personally write the source selection decision memorandum. See Latecoere Int'l Ltd., B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70.

a. While the related FAR provisions suggest the source selection decision is made by a single person, some noted government contract experts "believe the source selection decision is a team decision, and . . . that is as it should be." Ralph C. Nash & John Cibinic, *The Source Selection Decision: Who Makes It?*, 16 NASH & CIBINIC REP. 5 (2002).

b. Compare Army Federal Acquisition Regulation Supplement (AFARS) § 5115.101, which states the SSA, *independently exercising prudent business judgment*, arrives at a Source Selection Decision based on the offeror(s) who proffers the best value to the

Government. *The SSA shall not receive a recommendation from any individual or body as to whom shall receive the award and additionally shall not receive a rank order or order of merit list pertaining to the offers being evaluated.*

c. Source selection officials have considerable discretion in making the selection decision, including tradeoffs: The selection decision is subject to review only for rationality and consistency with the stated evaluation criteria. See KPMG Consulting LPP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196; Johnson Controls World Servs., Inc., B-289942; B-289942.2, May 24, 2002, 2002 CPD ¶ 88;

d. SSA can disagree with the majority of the evaluators and accept one of the minority's recommendation for award. GAO upheld the SSA's selection for award where the SSA reached a reasoned conclusion, supported by the record, that the awardee's lower-priced, lower-rated proposal deserved a higher technical rating than was assigned by the majority and that proposal represented the best value to the government. TruLogic, Inc, B-297252.3, Jan. 30, 2006, 2006 CPD ¶ 29.

e. An agency's source selection decision cannot be based on a mechanical comparison of the offerors' technical scores or ratings per se, but must rest upon a qualitative assessment of the underlying technical differences among the competing proposals (i.e., "look behind the ratings"). C&B Constr., Inc., B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1; Metro Machine Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112; The MIL Corp., B-294836, Dec.30, 2004, 2005 CPD ¶ 29.

8. A well-written source selection memorandum should contain:

a. A summary of the evaluation criteria and their relative importance;

b. A statement of the decision maker's own evaluation of each of the proposals: (1) adopting recommendations of others or stating a personal evaluation; and (2) identifying major advantages and disadvantages of each proposal (see J&J Maintenance Inc., B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106); **and**

c. A description of the reasons for choosing the successful offeror, comparing differences in cost with differences in technical factors.

(1) The source selection decision memorandum must include the rationale for any trade-off made, "including benefits associated with additional costs." FAR §§ 15.101-1(c) and 15.308; Midland Supply, Inc., B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2 (finding an agency's award unreasonable where it mechanically compares total point scores and provides no documentation or explanation to support the cost/technical tradeoff); Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61 (finding it improper to rely on a purely mathematical price/technical tradeoff methodology).

(2) This explanation of any tradeoffs made, including the benefits associated with additional costs can be given by the SSA in the source selection decision, or it can be evidenced from the documents on which the source selection decision is based. TRW, Inc., B-260788.2, Aug. 2, 1995, 96-1 CPD ¶ 11. The source selection decision memorandum should indicate what evaluation documents it relies upon.

P. GAO Review. In reviewing protests against allegedly improper evaluations, the GAO will examine the record to determine whether the agency's evaluation was reasonable and in accordance with the solicitation's stated evaluation criteria. Innovative Tech. Corp., B-401689, et al., Nov. 9, 2009, 2009 CPD ¶ 235.

1. Reasonable and in Accordance with Evaluation Criteria.

a. In reviewing an agency's evaluation, GAO will not reevaluate the proposals. Rather, it will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation and applicable procurement laws and regulation. AHNTECH, Inc., B-295973, May 11, 2005, 2005 CPD ¶ 89. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68; C. Lawrence Constr. Co., B-287066, Mar. 30, 2001, 2001 CPD.

b. In a negotiated procurement for award on a trade-off basis, which provided for the evaluation of the degree to which offerors' proposals met or exceeded requirements, protest was sustained where the agency failed to qualitatively assess the merits of the offerors' differing approaches. Sys. Research and Applications Corp., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶28.

c. Reliance on the scores of evaluators alone, without looking at strengths and weaknesses of each proposal, may be unreasonable. See Midland Supply, Inc., B-298720, B-298720.2, Nov. 29, 2006, 2007 CPD ¶ 2; SDA, Inc., B-248528.2, Apr. 14, 1993, 93-1 CPD ¶ 320.

d. The source selection authority need not accept the findings and conclusions of the agency evaluators, so long as the SSA's reason for doing so is reasonable, consistent with the stated evaluation criteria, and sufficiently documented. SAMS El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44; Earl Indus., B-309996, B-309996.4, Nov. 5, 2007, 2007 CPD ¶ 203; DynCorp Int'l LLC, B-289863.2, May 13, 2002, 2002 CPD ¶ 83 (finding no support in the record for the SSA to question the weaknesses in the awardee's proposal as identified by the evaluation teams).

(1) The SSA may consider proposals to be technically equivalent, notwithstanding different evaluation ratings, and award to the lower cost offeror. See Camber Corp., B-293930; B-293930.2, July 7, 2004, 2004 CPD ¶ 144; PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD 148

(2) Conversely, the SSA may reasonably consider one proposal to be technically superior to another notwithstanding equivalent evaluation ratings. See Vantage Assocs., Inc., B-290802.2, Feb. 3, 2003, 2003 CPD ¶ 32; Science & Eng'g Servs., Inc., B-276620, July 3, 1997, 97-2 CPD ¶ 43.

e. Gen. Dynamics One Source, LLC, B-400340.5, B-400340.6, Jan. 20, 2010, 2010 CPD P 45. The agency failed to evaluate disparity between staffing offered in awardee's technical proposal and its price proposal, as well failed to evaluate awardee's ability to hire incumbent's employees (as it proposed) at the low labor rates in its price proposal. GAO sustained the protest and found unreasonable the agency's failure to consider this price realism concern in both the price and technical evaluations.

f. Ahtna Support and Training. Servs., B-400947.2, May 15, 2009, 2009 CPD ¶ 119 (sustaining protest where the agency evaluated the awardee and the protester unequally by crediting the awardee with the experience of its subcontractor, but not similarly crediting the protester with the experience of its subcontractor, even though the agency viewed both subcontractors as having relevant experience).

2. Adequacy of Supporting Documentation.

a. Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 (sustaining protest that the agency's evaluation and source selection decision were unreasonable where the agency described the protester's demonstration as "problem plagued," but the agency's record lacked adequate documentation to support its findings and, as a result, GAO could not determine if the agency's evaluation was reasonable).

b. AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2007 CPD ¶ 65 (finding SSA's evaluation of offeror's management approach unreasonable where the agency reached a conclusion regarding the offeror's staffing plan that was inconsistent with the underlying evaluation findings and provided no explanation for this inconsistency, and then relied on this conclusion as a material part of its best value tradeoff determination); Cortland Mem'l Hosp., B-286890, Mar. 5, 2001, 2001 CPD ¶ 48; Wackenhut Servs., Inc., B-286037; B-286037.2, Nov. 14, 2000, 2001 CPD ¶ 114 (emphasizing the importance of contemporaneous documentation).

c. C&B Constr., Inc., B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1 (protest challenging award to the higher priced, higher technically-rated vendor sustained where the contemporaneous evaluation record consists of numerical scores assigned to each vendor's quotation, and lacks any information to show a basis for those scores, or a reasoned basis for any tradeoff judgments made in the source selection).

d. In one case, a SSA's source selection decision to award to a substantially lower scored offeror, whose cost was only slightly lower, was not adequately justified. TRW, Inc., B-234558, June 21, 1989, 68 Comp. Gen. 512, 89-1 CPD ¶ 584. However, after the SSA's reconsideration, the same outcome was adequately supported. TRW, Inc., B-234558.2, Dec. 18, 1989, 89-2 CPD ¶ 560.

e. Honeywell Tech. Solutions, Inc., B-400771; B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49. Having decided to consider a particular contract performed by the awardee, the agency was required to evaluate the relevance of that contract consistent with the evaluation criteria in the RFP, i.e., the degree of similarity in size, content and complexity between an offeror's past performance information and the RFP requirements. Here, there was nothing in

the contemporaneous record to suggest that the agency engaged in such an analysis.

3. The standard of review for the Court of Federal Claims is whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2); Cubic Applications, Inc. v. U.S., 37 Fed. Cl. 339, 342 (1997).

Q. Responsibility Determination.

1. A contract may only be awarded to a responsible prospective contractor. FAR § 9.103(a). No award can be made unless the contracting officer makes an affirmative determination of responsibility; in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of nonresponsibility. FAR §9.103(b). A finding of responsibility requires, among other things, that the potential contractor have adequate financial resources, a satisfactory record of performance, integrity, and business ethics, and the necessary organization, experience and technical skills to perform the contract. FAR § 9.104-1.

2. "Negative" vs. "Affirmative" Responsibility Determinations.

a. Negative Responsibility Determinations.

(1) Since the agency must bear the brunt of any difficulties experienced in obtaining the required performance, contracting officers have broad discretion and business judgment in reaching nonresponsibility determinations, and GAO will not question such a determination unless a protester can establish that the determination lacked any reasonable basis. See XO Commc'ns, Inc., B-290981, Oct. 22, 2002, 2002 CPD ¶ 179; Global Crossing Telecomms., Inc., B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102.

(2) Small Business Responsibility. If the contracting officer determines that a small business lacks certain elements of responsibility, under FAR 9.105-2 (a)(2) the contracting officer must comply with FAR Subpart 19.6 and refer the determination to the SBA.

b. Affirmative Responsibility Determinations

(1) Pre-Garufi. Although the FAR requires the contracting officer to make an affirmative determination of

responsibility before contract award, prior to 2001 a disappointed offeror challenging such a determination found the contracting officer's decision nearly unassailable.

(a) Previously, the GAO quickly disposed of such challenges (see e.g., SatoTravel, B-287655, July 5, 2001, 2001 CPD ¶ 111) by simply referencing its Bid Protest Regulations, which provided that: because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of the government officials. 4 C.F.R. § 21.5 (2002).

(b) Similarly, the COFC had been equally inhospitable to affirmative responsibility challengers. See, e.g., Trilon Educ. Corp. v. United States, 578 F. 2d 1356 (Cl. Ct. 1978); News Printing Co., Inc. v. United States, 46 Fed. Cl. 740 (2000).

(2) Impresa Construzioni Geom. Domenico Garufi v. United States (Garufi), 238 F.3d 1324 (Fed. Cir. 2001).

(a) In Garufi, the CAFC stated the standard of review in cases challenging agency affirmative responsibility determinations should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis." Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Fed. Cir. 2001).

(b) Applying this standard to the facts of the case, however, CAFC found it could not assess the reasonableness of the contracting officer's determination "because the contracting officer's reasoning supporting that determination is not apparent from the record." Garufi, 238 F.3d at 1337.

(c) On remand, the COFC sustained the protest, having determined the "contracting officer, based on his deposition testimony, . . . failed to conduct an

independent and informed responsibility determination." Impresa Construzioni Geom. Domenico Garufi, 52 Fed. Cl. 421, 427 (2002).

(3) Post-Garufi.

(a) As the standard set forth by CAFC in Garufi conflicted with the GAO's Bid Protest Regulation addressing affirmative responsibility determinations, the GAO changed its rule. Applicable to all bid protests filed after 1 January 2003, the final rule permits GAO review of such challenges "that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation." 4 C.F.R. § 21 (c)

(b) In Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177, the GAO relied on the new exception to entertain and sustain the protestor's challenge to a contracting officer's affirmative responsibility determination. The GAO noted that, while contracting officers need not explain the basis for responsibility determinations, "documents and reports supporting a determination of responsibility and nonresponsibility . . . must be included in the contracting file."

(c) Compare the result in Marinette Marine Corp., B-400697 et al., Jan. 12, 2009, 2009 CPD ¶ 16 (citing evaluation of awardee's past performance, the agency was aware of and considered awardee's failed performance on another program, as well as Justice Department investigation into that program. GAO's review could not conclude that the agency failed to consider all relevant information when making a responsibility determination.). See also FN Mfg., Inc., B-297172, B-297182.2, Dec. 1, 2005, 2005 CPD ¶ 212.

(d) Attribution of subcontractor expericne to prime contractor in responsibility determination. Protest sustained when awardee did not meet solicitation's responsibility criterion requiring at least 5 years

general contractor experience where solicitation language not reasonably interpreted as permitting use of a subcontractor's experience to satisfy the requirement. J2A[2] JV, LLC, B-401663.4, Apr. 19, 2010, 2010 CPD ¶ 102.

VII. DEBRIEFINGS

A. Purpose

1. 10 U.S.C. § 2305(b)(5-6); FAR § 15.505-506. See AMC Pam. 715-3, App. F (providing guidelines for conducting debriefings).

2. Inform the offeror of its significant weaknesses and deficiencies, and

3. Provide essential information in a post-award debriefing on the rationale for the source selection decision.

B. Preaward Debriefings. FAR § 15.505.

1. An offeror excluded from the competitive range (or otherwise eliminated from consideration for award) may request a preaward debriefing.

2. An offeror must submit a written request for a debriefing within 3days after receipt of the notice of exclusion from the competition.

3. The contracting officer must "make every effort" to conduct the preaward debriefing as soon as practicable.

4. The contracting officer may delay the debriefing until after contract award if the contracting officer concludes that delaying the debriefing is in the best interests of the government. See Global Eng'g. & Const. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (declining to review the contracting officer's determination).

5. At a minimum, preaward debriefings must include:

a. The agency's evaluation of significant elements of the offeror's proposal;

b. A summary of the agency's rationale for excluding the offeror; and

c. Reasonable responses to relevant questions.

6. Preaward debriefings must not include:

   a. The number of offerors;

   b. The identity of other offerors;

   c. The content of other offerors' proposals;

   d. The ranking of other offerors;

   e. The evaluation of other offerors; or

   f. Any of the information prohibited in FAR §15.506(e).

C. Postaward Debriefings. FAR § 15.506.

1. An unsuccessful offeror may request a postaward debriefing.

   a. An offeror must submit a written request for a debriefing within 3 days of the date it receives its postaward notice.

   b. The agency may accommodate untimely requests; however, the agency decision to do so does not extend the deadlines for filing protests.

2. "To the maximum extent practicable," the contracting officer must conduct the postaward debriefing within 5 days of the date the agency receives a timely request.

3. At a minimum, postaward debriefings must include:

   a. The agency's evaluation of the deficiencies and significant weaknesses in the offeror's proposal;

   b. The overall ratings of the debriefed offeror and the successful offeror;

   c. The overall rankings of all of the offerors;

   d. A summary of the rationale for the award decision;

   e. The make and model number of any commercial item(s) the successful offeror will deliver; and

   f. Reasonable responses to relevant questions.

4. Postaward debriefings must not include:

a. A point-by-point comparison of the debriefed offeror's proposal with other offerors' proposal; or

b. Any information prohibited from disclosure under FAR §24.202 or exempt from release under the Freedom of Information Act, including the names of individuals providing reference information about an offeror's past performance.

5. General Considerations:

a. The contracting officer should normally chair any debriefing session held.

b. Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

c. Tailor debriefings to emphasize the fairness of the source selection procedures.

d. Point out deficiencies that the contracting officer discussed but the offeror failed to correct.

e. Documentation. An official summary of all preaward and postaward debriefings shall be included in the contract file. FAR §§-15.505(g), 15.506(f).

f. Point out areas for improvement of future proposals.

g. Statements made by the agency at a debriefing that are inaccurate (i.e., inconsistent with the contemporaneous evaluation documents) may give rise to a bid protest challenging the agency's evaluation of proposals, but do not provide a basis for sustaining such a protest. GAO looks to see whether the agency's evaluation of proposals, as evidenced by the contemporaneous evaluation documents, was reasonable and consistent with the stated evaluation criteria. Debriefing misstatements do not invalidate the contemporaneous evaluation documents.

h. Agencies should look to debriefings as a means to prevent bid protests. A well conducted debriefing can head off many protests. GAO dismisses protests where the protestor alleges that a debriefing was inadequate because a debriefing is a procedural matter which does not involve the award's validity. Raydar & Associates, Inc., B-401447, Sept. 1, 2009,2009 CPD ¶ 180

CONCLUSION